

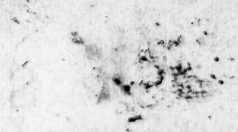
E S S A Y
UPON THE
LAW OF CONTRACTS
AND
AGREEMENTS.

By JOHN JOSEPH POWELL, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Ista veritas, etiamsi jucunda non est, mihi tamen grata est.
CIC.

IN TWO VOLUMES.
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Of the Remedy to enforce Agreements in Law and Equity.

CONTRACTS, being the subject of both legal and equitable proceedings, and made for the benefit of certain persons, pre-supposing also property and price; *they*, if not gained improperly, nor made in opposition to the municipal laws, ought to be by these laws enforced: For what can be more consonant to good faith between men, than the observance of those things which they have, *themselves*, stipulated and made a law between one another. In adjudging on contracts, therefore, respect ought first to be had to carry into execution the specific thing agreed for, if that can possibly be obtained; and if the specific thing contracted for cannot be obtained, then a sufficient equivalent.

But the common law of *England* is very defective in this respect, where an actual * performance of that which is contracted about is obtained, which, from a variety of circumstances, is *frequently* impracticable: For executory agreements, in the eye of the common law, were, and are still, looked upon but as a personal security; and as entitling the person injured by the breach thereof to damages only, which may be procured by an action of covenant if there be a deed, or by an assumpsit if there be no deed.

7 Mod. 143.
[* 2.]

Thus if a man covenant to settle his lands upon his marriage, or to convey them for a valuable consideration; the covenantee, *at common law*, can only recover damages for the breach of such covenant, and has no remedy there to enforce the settlement of the thing itself.

This defect in the common law, may, perhaps, be imputed to the genius and notions of the antient *Saxons*, who carried the love of liberty to the utmost excess, and deemed any encroachment upon it insupportable. It was natural for men of such sentiments, who considered the being compelled to do any act at the precise time, or in the precise manner appointed or required, as beneath the

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[* 3.] * condition of a freeman (which sturdy disposition of our ancestors, gave rise to the practice of essoins) to hold the being obliged to deliver a thing promised, but which, according to their own principles, still belonged to them, the property not being changed by the promise, as an *infringement* on liberty: They, therefore, thought it sufficient, in cases of this sort, where the buyer was frustrated of a thing on which he depended, to allow him an adequate compensation.

But the end of all contracts being the actual accomplishment of the thing stipulated, this measure of damages by no means answered the object proposed, and was an imperfect remedy. Upon this ground a court of equity interfered, and dealt with the corrupt conscience of the party, when he refused to perform what he had stipulated: and to make the remedy adequate to the mischief, that court directed *that* to be done which a man in honesty and conscience ought of himself to have done: Namely, the estate itself to be settled; or it decreed a delivery of the thing itself; or a performance of what was stipulated according to the contract.

[* 4.] * However, there are some cases where the common law enforces a specific execution of an agreement. As by assumpsit for money had and received, or paid, &c. which is virtually a bill in Chancery for a specific execution. So in cases of covenants real to convey or dispose of lands, for which the remedy is, by a special writ of covenant for a specific performance of the contract concerning certain lands particularly described in the writ. This is the writ upon which fines were levied at common law. It is said it was also used by termors, who were ousted to recover their terms by virtue of their leases, which are real covenants. But, since the court of Chancery have obliged wrongdoers by ouster to a specific restitution, courts of law have given an *habere facias possessionem* (founded upon the recovery in ejectment, which formerly was a remedy to recover damages only) to recover the term in specie.

10 H. 6. 13.
Fitz. Nat. Brev.
343.

Fitz. Nat. Brev.
505, 506.

Fitz. Abr. tit.
Subpoena, Pl. 7.

The earliest traces I find of the equitable jurisdiction in decreeing agreements, is in a case stated in the year-book of E. 4. 4 b. where it is said by Genny "that if I promise to build you a house, and do not perform

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perform my * promise, you have your subpœna,' [* 5.]
 which lies for non-performance of a promise; for a
 promise there amounts to a covenant. And *Fineux*,
 Chief Justice, in the 21 Hen. 7. speaking upon the dif-
 ferent remedies given in the court for non-perform-
 ance of contracts, observes, "that if a man bargain
 with another that he shall have his land for 10*l*. and
 that he will make him an estate therein by such a day,
 and he do not make the estate, an action upon the
 case lies, but it is to be observed, *in that* he shall only
 recover damages; but, by subpœna, the chancellor
 may compel him to execute the estate, or imprison
 him. So that the jurisdiction of the court of Chancery
 in these cases, is clearly deducible from about this pe-
 riod.

However, notwithstanding these early instances of
 an acknowledgment of this branch of the equitable ju-
 risdiction appear in our books, yet the authority of that
 court, in decreeing a specific performance of promises,
 on breach of which a remedy might have been had in
 damages at common law, was much questioned so late
 as the 14th of *James* the First; for, in the case of *Bromage* v. *Jenning*, wherein the former sued in the
 marches of *Wales* against the * latter, for not making
 a lease according to his bargain, a prohibition was pray-
 ed in the King's Bench; because an action upon the
 case lay at common law. And it was said by *Coke*, *Do-*
deridge, and *Haughton*, that, without doubt, a court of
 equity ought not to enforce the making the lease; for,
 if it might, to what purpose was the action on the case,
 or of covenant? And *Coke* said, that this would sub-
 vert the intent of the covenantor, who meant to have
 an election either to pay damages, or make a lease;
 whereas this was to compel him to make a lease against
 his will: And a prohibition was granted.

However, the law seems to have been settled in fa-
 vor of the jurisdiction of courts of equity to decree the
 specific performance of agreements soon afterwards:
 For, in *Molineux's* case, which arose in the second of
Charles the Second, such suits were said to be common
 in courts of equity.

In that case, A. promised, in consideration of, &c. *Molineux's*
 to make assurance of certain lands to nn. which assu-
 rance A. afterwards refused to make, whereupon nn.
 sued him in the court of Requests to have a specific
 performance

21 H. 7. 41.
 Bro. tit. Ac.
 Ca. 72.

Bromage v.
Jenning, 1 Roll.
 Rep. 354. 368.
 [* 6.]

ca'se, Latch.
 172. See Noy
 88.

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[* 7.] performance of * the promise. One cause alleged, on motion for a prohibition, was, that an action upon the case lay at common law: But it was answered, that, though no suit lay at common law to acquire the thing itself, yet that such suit was common in a court of equity. But *Jones* said, that such suit could not be instituted in a court of Requests, although it might be instituted in Chancery. However, the court refused to grant a prohibition, because the plaintiff could not sue at common law to assure white acre, but only to recover damages.

And, on the abolition of the court of Requests, by the statute 16 Car. 1. c. 10. the jurisdiction in these cases was left in the possession of the courts of equity, who, alone, can now decree a specific execution of agreements.

*Penn v. Lord
Baltimore,
1 Vez. 447.*

The law was so laid down by Lord *Hardwicke*, in the case of *Penn* and Lord *Baltimore*; which was a bill founded upon articles, executed under seal in *England*, for mutual considerations respecting lands in *America*.

Ibid.

[* 8.] In delivering judgment in the last-mentioned case, Lord *Hardwicke* said, that there * were several cases wherein collaterally, and by reason of the contract of the parties, matters, originally out of the jurisdiction of the court of Chancery, might be brought within it. Suppose there was an order of the king and council in a cause wherein the king and council had original jurisdiction, and the parties entered into an agreement under hand and seal for performance thereof. A bill must be brought in the court of Chancery for a special performance. The reason was, because none but a court of equity could decree that. The king in council was the proper judge of the original right, and whether the agreement was fairly entered into and signed. The king in council might look on that, and allow it as evidence of the original right, but if that agreement was disputed, it was impossible for the king in council to decree it as an agreement. That court could not decree *in personam* in *England*, unless in certain criminal matters, being restrained therefrom by the statute 16 Car. 1. cap. 10.

This equitable interposition extends to all cases, where either the subject agreed about, or the person contracting, are within the jurisdiction of the court; which

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which acts in *personam*, * as well as in *rem*, whenever the conscience of the party is bound. Indeed, the primary decree in the court of Chancery, as a court of equity, was in *personam*, and it was not settled, until long after its first institution, that the court could issue process to put parties into possession in a suit of lands. That practice was first begun and settled in the time of James the First, and has ever since been done by injunction or writ to the sheriff. Therefore, though a court of equity cannot enforce its decree as to the possession of lands in *Ireland*, or the Plantations, yet, if the persons be within its jurisdiction, it may properly decree a contract or an agreement to be specifically carried into execution, if there be a foundation for it.

[* 9.]

Thus the court of Chancery, in the time when Lord King presided there, made a decree on a suit for lands and a house in *Philadelphia*, although it could not be enforced in *rem*. So Lord Hardwicke, in Lord Anglesey's case, made a decree for distinguishing and settling the parts of an estate in *Ireland*, although it was impossible for the court to enforce that decree in *rem*; because the court could enforce it by process of contempt in * *personam* and sequestration; which is the proper process of the court. And upon the same principle Lord Hardwicke, in Lord Baltimore's case, decreed a specific performance of articles executed in *England*, concerning the boundaries of the provinces of *Pennsylvania* and *Maryland* in *America*.

Richardson v. Hamilton,
1 Vez. 454. Et vide Toller v. Carteret,
2 Vern. 494.

And a court of equity collaterally, and in consequence of an agreement, judges concerning matters not originally within its jurisdiction. *Ex gratia*, it will retain and decree upon a suit for specific execution of articles of agreement to perform a sentence in the ecclesiastical court, just as a court of law will maintain an action for breach of covenant thereupon.

[* 10.]
Penn v. Lord Baltimore,
1 Vez. 444.

And a court of Equity will decree any contract that ought, in *foro conscientiae*, to be carried specifically into execution. Therefore, if a man be divorced from his wife for adultery, and marry another, and enter into an agreement upon such marriage, a court of equity will decree a specific performance of such an agreement; because it is a marriage according to Christian law; and agreements that are made upon such marriage

Vide 1 Vez.
447, 448.

Gillb Hist.
Chan. 236, 237.

ages

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[* II.] ages ought to * be established *in foro conscientiae*: For, though such marriage be a nullity by the common law, upon political reasons, lest marriages should be dissolved by frequent adulteries; yet, since they are not against the law of God, such agreements upon such marriages are not contrary to natural justice nor *mala in se*, and ought therefore to be established in a court of conscience. Especially as there is a meritorious cause in the agreement, since the woman gives up her person to the man, and likewise her fortune.

Angier v. Augier, Pre.Chan. 96. Gilb. Rep. Eq. 152.

Again; if quarrels happen between husband and wife, and the wife libel in court christian for a separate alimony, and, to quiet this suit, the husband enter into an agreement with a third person to pay the wife so much a year, by way of a separate maintenance; though a court of equity will not decree alimony, because it belongs to the jurisdiction of the ecclesiastical court to enquire into family secrets, yet it will decree a specific execution of this agreement of the husband: Because he ought in conscience to perform it, and no other court has a proper jurisdiction to decree such agreement.

[* 12.]
Taylor v. Wheeler,
2 Vern. 564.
Et vide 2 Vez.
633.

* And copyhold estates are liable to agreements and trusts, in the same manner as freeholds are; and, therefore, notwithstanding it has been urged that, if contracts for copyholds were decreed, the lords would be defrauded of their fines, courts of equity have frequently determined, that, if a copyholder enters into an agreement for a sale of his lands, and dies before surrender, or makes a surrender, and dies before presentment (which makes the surrender void) the contract should, for a valuable consideration, be carried into specific performance against the heir, or voluntary claimant standing in the place of the copyholder. It was so done in the case of *Taylor and Wheeler*, which underwent great consideration. There W. being seised of a copyhold estate, having borrowed money on mortgage, surrendered the estate into the hands of two customary tenants. Several years passed, but no care was taken to get the surrender presented; and, in the mean time, the mortgagor became a bankrupt, and died intestate and insolvent. And, on a bill brought against the assignees and the heir to be relieved, and to supply the defect of the surrender, it not being presented in time; the court decreed that the surrender should

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* should be supplied, considering the mortgagee as in [* 13.]
the nature of a purchaser by a defective conveyance,
which a court of equity will supply as against the ven-
dor, and all claiming under him.

* Of the equitable Jurisdiction in Decree- [* 14.]
ing executory Contracts and Agree-
ments.

THIS part of the jurisdiction of a court of equity is discretionary, not only in cases where there is an election of two remedies, *viz.* by applying to a court of equity for a specific performance, or by action at law, as in the common cases of covenants; but also in cases where there is no remedy on the agreement at law, so that unless a court of equity will carry it into execution, it cannot be enforced at all. Of this nature are cases where the whole agreement arises under the acts of the court itself, from orders amounting to decrees; as a judicial sale of an estate, or a purchase before the master: And, therefore, whether there be other remedy or not, still courts of equity refuse to interfere, if there be strong and material objections to the carrying such contract into execution; whether these objections be such as they were not aware of

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[* 15.] of at * the time of such order made, or arising from subsequent events and alteration of rights thereby.

Attorney General v. Day,
supra.

Upon these grounds it was that the court, in the case of the Attorney General and *Day*, refused to decree a specific execution of an agreement founded upon an order made on a master's report, and a decree thereupon for the judicial sale of an estate to the trustees of a charity; namely, First, That to decree a purchase of the lands conveyed to the charity to be made with the money devised to it, would be contrary to the true intent and principle of the mortmain act, and

9 Geo. 2. c. 16. make a great opening to evade it: For, by that means, a person knowing that if he died within a year after the conveyance, the statute would make it void, might give the exact value thereof in money the same way, and, then, the one to be laid out in purchase of the other; which matter, had it been fully entered into at the making of that order, as it was at the time of the then application, would have prevented its being made; but it passed *sub silentio* then, the parties agreeing, and the objections not having been laid before the court. Secondly, Because it could not, from subsequent events,

[* 16.] be executed entirely; for, on the death * of W. his part was gone over to his issue in tail, an infant, against whom the court could not decree then, nor could they if he had been of full age; because the court had no jurisdiction to enforce such an agreement against the issue in tail, although it might have enforced it against the tenant in tail. And then, although a private person might have elected to have had it executed in part, yet, in this case, it should not be executed at all, the court being to judge for the charity; and it not being for their benefit to purchase the undivided moiety of an estate, such a tenure being inconvenient and entangled.

Vide supra. Et It has been observed, that, unless in particular instances which furnish exceptions to the general rule, the court will not decree a specific execution of an agreement on a bill, whereupon damages would not be

Cannel v. Buckle, 1 P. Will.
243. Supra.

recovered at law on an action: One instance of an exception to this rule, was put by Lord *Macclesfield*, in the case of *Cannel* and *Buckle*, namely, that of a covenant of a feme, being an infant, to convey her inheritance on marriage to her husband, in consideration of an adequate settlement.

The

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* The true ground of distinction seems to be this; [* 17.]
 such agreements, whereupon an action at law cannot be maintained by reason merely of a *formal defect* of the instrument, will be carried into execution in Chancery. But that court will rarely enforce such agreements, whereupon an action cannot be maintained, by reason of *events* not happening as provided for by the parties, the absence of which render the agreement ineffectual at law; because the same construction must be made on an agreement in equity as at law.

The before-mentioned case of *Cannel and Buckle* fur-^{Supra.}
 nishes an instance of the former kind, and that of *Whit-* Whitnel v.
nel and Farrel is an instance of the latter kind. There^{Farrel, 1 Vez.}
 A. having, at the time of his marriage, an estate of^{256.}
 300*l. per annum* in possession, and a leasehold estate, out of both of which he could make a provision for a wife; and having also an estate tail in other hereditaments after the jointure of his mother determined, settled 500*l.* part of his wife's portion, in trust for her and the issue of the marriage; and also settled the leasehold for the benefit of the wife for life in bar of dower, not carrying this over to the issue; he then took up the consideration of an additional * portion of the wife paid by her father, and covenanted that, within six months after the death of his mother, and his coming to be in possession of the estate so in jointure, he, his heirs, and assigns, should settle so much thereof as amounted to 100*l. per annum*, for every 1000*l.* he might in future have, upon her for life, then to the issue of the marriage, and for want of such issue, to his heirs; A. died in his mother's life-time leaving no issue, and the estate came to his sister: And upon a bill preferred against her, after the death of the mother, to compel her to execute this covenant in specie, Lord *Hardwicke* was of opinion, that the widow was not entitled to such decree; because no action could have been brought upon this covenant at law, there being two contingencies upon which the obligation to perform it was to arise; namely, the mother's death, and his being in possession, and one of them only had happened; for, though the mother was dead, the son never came into possession. Now, his lordship said, that in an action of covenant against the heir at law or executor, it must have been alledged, in order to assign a breach, that he came into possession after the mother's death;
 and,

[* 18.]

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[* 19.] and, as that could not be done, no action could be maintained. * Then there were few cases in which a court of equity would decree a performance of a covenant or agreement upon which, according to the words of the articles, and the events that had happened, there could be no action at law; for, when the instrument was regularly drawn, the court of Chancery could not put a construction upon such an agreement different from what a court of law would; and his lordship (tho' he observed that the case was not clear of doubt) dismissed the bill, so far as it sought a specific performance.

He that exhibits a bill for a specific performance of a contract or agreement, must, in order to entitle himself to the aid of the court, shew that he has performed all that was contracted to be done on his part, or that he is ready so to do; because it is a rule of equity, in contracts and agreements, that they must be decreed to be performed on both sides, *and entirely, or not at all*. And, therefore, if it has by subsequent events become impossible for a plaintiff to perform his part of the agreement at the time of exhibiting his bill, he cannot be entitled to a specific performance of that contract, which he is himself incapable to execute specifically.

[* 20.]
Powell v. Pillett, Gilb. Eq. Rep. 188. Et vide Butcher v. Hinton et Short, 1 Chan. Ca. 302. Et 1 Vez 87. Et vide S. L. Skin, 287.

* Therefore where A. agreed to pay B. 200*l.* within two years, on condition that B. married his daughter, and settled 600*l.* upon her for a jointure, to be laid out in land; and the marriage was had, and there was issue a daughter, but both the mother and daughter died before the two years expired: It was contended, on a bill preferred against A. for a specific execution, that A. ought to perform this contract; for that B. had married his daughter, and had been looking out for a purchase, and it was the act of God only that had prevented his executing his part of the contract. But the court said, that it was in B.'s power to have entitl'd himself to the 200*l.* when he had pleas'd by laying out the 600*l.* which, not having done, he had not entitl'd himself to a performance in specie by the other party; therefore the bill was dismissed with costs.

Lord Feversham v. Watson, Finch 445. 2 Freem. 35. Skin, 287.

So, where Lord *Feversham*, by his marriage agreement, contracted to settle 2000*l.* a year on his wife in this manner, *viz.* by settling the manor of H. &c. worth about 1100*l.* *per annum*, on his wife, and the heirs of their bodies, and selling some pensions, and buying such other estates with the money received by the

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the * sale, as would make up the jointure 2000*l. per annum* as agreed upon; in consideration whereof the wife's father agreed to settle 3000*l. per annum* on his lordship for life, remainder, &c. Lord *Feversham* settled the manor, &c. but, before he had sold the pensions, or made the further provision, his lady died without issue. Then his lordship preferred his bill to have the 3000*l.* settled on him during his life; but the court refused so to decree: Because Lord *Feversham* had not performed the whole of his agreement, and the other part was then become impossible; and, as it admitted of no compensation, he had no title in equity to have performance of his father-in-law's part of the agreement, since he could not perform his own part of it.

In this respect the practice of courts of equity agrees with that of courts of law; for the latter require, that where an action of assumpsit is brought upon, or an action upon a covenant in, an agreement, wherein the second thing to be done, and for not doing of which the action is brought, is *in consideration of something to be done first*; the person bringing the action should shew, if the thing be done by him be such as he can perform without the * interference of the other contracting party, that he has done the first thing; or, if it be of such a nature that it cannot be done without the concurrence of the other contracting party, that he is ready, and has a right, at the time of bringing the action, to do it.

But, in these cases, a distinction is made in equity (the office of which is to relieve against difficulties arising from unavoidable accidents) where that party, who has performed part of his agreement, and is in no default for not performing the residue, is in *statu quo*; that is, is not under any disadvantage from what he has done (as was the case of ^a Lord *Feversham* before-mentioned, who, by the death of his wife without issue, was in seisin of his estate in the same predicament as before the marriage) and where he is not in *statu quo*; for, in the latter case, he shall have a specific execution of the agreement from the other party.

^b Thus, where a vessel was let to freight to the *East India Company* by charter-party, to go from port to port, and to any port within the limits of their charter, but was to be dispatched for *England* on or before the 24th of *January* 1684, or so soon after as to save

Vide *Shelbourne v. Stapleton*, 8 Mod. 292. S. C. 3 Brown Par. Ca. 89. *Luxton v. Robinson*, Dougl. 620. But note the distinction

[* 22.] where there are mutual covenants, and not a stipulation to do one thing in consideration of another done; for if there be, then each of the parties may maintain his action without alleging the performance on his part, because if one covenants to do one thing, and another to do another thing, each of them may have his mutual action.

^a *Supra*.

^b *Edwin, et al, v. East India company*, 2 Vern. 21.

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- [* 23.] * save her monsoon for *England*; or, in default thereof, the owners were to pay four months demurrage at 7*l.* 10*s.* a day, for her monsoon so lost, and her stay in *India* after the 24th of *January* 1684; with this further clause, that the company might detain the ship in their employment for any longer time, not exceeding twelve months, after the rate of 7*l.* 10*s.* 6*d.* a day demurrage, until dispatched from the last lading port, or expiration of the twelve months, which should first happen; but, after that time, the ship was to return to *England*, and the company not to be subject to any farther demurrage, or any damage that might accrue by her detention: And the company covenanted therein, on the ship's arrival in *England* again, to pay freight for three hundred and one ton, and demurrage from the 20th of *January* 1684, until the ship should be dispatched, for the space of twelve months after that day. And it was thereby provided, that, *until six days after the ship should have returned to the port of London, and made a right and full discharge of all her lading*, the company was not to pay, nor to be liable to pay any of the sums of money agreed on for freight or demurrage, or for detaining the ship, in *India*; it being the intent of
- [* 24.] * the parties, that, if the ship should be lost either in her outward or homeward bound voyage, nothing should be paid by the company for freight or demurrage. The ship was employed in the company's service, so that she arrived not at *Surat* until 1686, which was a year beyond the time stipulated for the company's using her. She was from thence ordered to *Bombay*, where the ship, having been so long detained in those seas, was surveyed, and found not sufficient for a voyage to *England*; and in consequence thereof the seamen were discharged, and the ship left there. The company refused to pay any thing for freight or demurrage, because, by the express provision of the charter-party, they were not to pay until six days after the ship's arrival in *England*, and being discharged of her lading; and they said, that if they were to pay any thing, yet, they were to be charged with demurrage, until *March* the 23d, 1685 only, and no longer, according to the provision in the charter-party: They likewise refused to account for the value of the ship, or to shew how they had disposed of her. But on a bill filed for relief, In *Hotham v. East India com.* it was said, *per curiam*, that though the charter-party was

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was so penned that nothing could be recovered at * law, [* 25.] yet the owners had a just demand, and ought to be relieved in equity. And it was decreed accordingly, that the company should account for what they had made of the ship; that they should pay demurrage according to the rate mentioned in the charter-party; and that they should also be charged in respect of freight, according to the quantities of the respective commodities which were usually brought home on such a voyage by such a ship, and their proportions to each other.

And in the last mentioned case the court cited the case of *Westland and Robinson*, where, as in most cases, there was to be no freight paid for the outward bound cargo, but only a certain rate *per ton* for the homeward bound cargo, and, when the ship arrived beyond sea, the factor had no goods at all to load it with, so that the ship was forced to come home in ballast; and yet the court of Chancery decreed the payment of freight. And so it was said it had been done in a like case, of a ship that was hired at *Newcastle* for a voyage to the Duke of *Courland's* country, where freight was only to be paid for the homeward bound cargo; and, when the ship came there, the goods had been seized and attached, by reason of * which she was forced to come home empty: Yet, in that case, the freight was decreed.

^h And, upon the same principle, if a man has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue specific lands of such a value free from incumbrances, and has sold part of his land to disincumber and settle the rest, he shall, if the wife die without issue before the settlement be actually made, have the portion notwithstanding; because he, *having sold part of his lands*, cannot be put in *STATU QUO*; and there was no default in him, since he was going on to disincumber and settle the rest: Therefore the death of his wife will not, in equity alter his right to his wife's portion.

There is also a difference between carrying into execution agreements on marriage, and other agreements; for, though all other agreements are considered as intire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed against the other in specie, but must be left to an action at law; in marriage agreements it is otherwise: Because,

pany, vid.
Doug. Rep.
277.
Lord Mansfield said: in construing agreements, I know no difference between a court of law and a court of equity; a court of equity cannot make an agreement for the parties, it can only explain what their true meaning was, and that is also the duty of a court of law. And upon that ground the court has decided, that circumstances similar in some degree to those

[* 26.]
in the principal case here cited, would excuse the owners in an action on the charter-party, from shewing a strict performance of their part of the agreement; upon the ground that, upon the fair construction of the charter-party, it had been performed according to the true meaning of the parties.

^h Meredith v. Wynne. Gilb. Eq. Rep. 70. Pre. Chan. 312. 1 Eq. Ca. Abr. 70.

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[* 27.] although either the relations of the husband or wife should fail in the performance * of their part, the children, nevertheless, may compel a performance by the other party. As if the wife's father, for instance, had agreed to give a portion, and the husband's father had agreed to make a settlement, here, although the wife's father should not give the portion, yet, the children may compel a settlement; because, non-performance on one part, shall be no impediment to the children's receiving the full benefit of the settlement. So, if there be a failure on the part of the father's relations, the consequence will be the same; all the court can do in such cases is, to lay hold of such estate as the husband may claim towards making good his proportion of the settlement. The reason of this distinction between marriage agreements and others is, that the children, considered as purchasers, are intitled to all the benefit of *the uses* under the settlement, notwithstanding there has been a failure on one side.

Supra. 20.

Upon this principle it was admitted in Lord *Feverham's* case, that, if there had been issue of the marriage, they would have been entitled to have been relieved against the accident of the mother's death, by which their father was rendered unable to perform part of * what he had contracted for, and to have had the 3000*l.* a year settled upon them by their grandfather.

[* 28.]

The same principle extends to the case of the wife, under such articles, if she be not a party contracting for payment of her portion.

Perkins v. Lady Thornton,
cited 1 *Vez.*
377, 378.

Therefore where A. in consideration of 1000*l.* was, by articles, to which the intended wife was not a party, to settle a jointure on his wife; and the marriage was had, but the portion was not paid: On a bill by her to have the jointure, it was decreed to her; for, she was not a party, but was only to perform by marrying; and, therefore, was entitled to her jointure, on the faith of which provision being made her, she had married.

But this exception extends only to cases, where such contracting party is not to receive any benefit from the other side, or to take any advantage to themselves: Thus, if the wife, in the preceding case, had contracted to pay the portion, the court would not have decreed her to have had the settlement if she had not paid the portion;

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portion; unless * it could have been put in such a [* 29.]
 shape as that the husband could have had the benefit
 of the articles; for, then, the court would certainly
 have decreed it.

Thus where, previous to the marriage of A. ar-Pyke v. Pyke,
 ticles were entered into, by which he agreed to settle ^{1 Vez. 376.}
 an estate in *Ireland* first, on his intended wife (who
 was then under age) for a jointure, and then, subject
 to a provision for younger children, on the first and
 other sons in tail; and that the wife's fortune should
 remain in the hands of trustees, until the conveyances
 or settlement thereby intended should be executed.

And it was also agreed, that it was the intent that, to
 enable A. to execute the same conveyances and set-
 tlement, the wife's portion should be applied to the
 discharge of the incumbrances affecting the estate, and
 the overplus be paid to A. his executors and admini-
 strators. The marriage was had, but no settlement
 was made. The husband afterwards went abroad,
 and there died. Then the wife preferred her bill
 against the executors of her father and her children,
 for the payment of the residue of her father's personal
 estate, as the right thereto survived to her, upon her
 husband's death. No estate * in *Ireland* appeared, [* 30.]
 and it was admitted on all sides that no settlement
 could now be made; but the defendants, the children
 of the marriage, insisted, that they were purchasers
 under these articles, as an agreement by the mother
 for the disposal of her estate, which was binding;
 suggesting, that they were equally entitled with the
 mother to have the benefit of it, although no settle-
 ment had been made; and that the court should decree
 an equivalent to them, or that an equitable apportion-
 ment should be found out, this being a losing bargain,
 and both parties purchasers. But Lord *Hardwicke* was
 of opinion, that the children, under these circumstan-
 ces, were not entitled; and that no court of justice
 could take this portion out of the hands of the mother
 or her trustees, who were the representatives of her
 father, unless she had that part of the settlement,
 agreed for her benefit, made good to her; for, the
 loss arose from the fraud and misbehaviour of the father
 of the children. The mother had as good an equity
 as themselves, and had the law on her side, having a
 right to sue in the ecclesiastical court, which was the
 law of the land in this case; then they were all pur-
 chasers

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[* 31.]

chafers in equal degree, and the children had not a right to * come against the mother, to make good the failure on the part of the father. The agreement was only that the wife's fortune should remain in trustees, till a settlement should be made in pursuance of it, which settlement was to be of the husband's estate, and her portion was to pay off the incumbrances thereon; but no such estate had appeared. Then, if no such estate could be found, there could be no specific performance.

And, where the one party to an agreement has performed all that is requisite on his side, and, before the time at which the other side is to perform his part of the agreement, the legislature interfere, and render a performance on his side as to part illegal; a court of equity ought, notwithstanding the beforementioned rule, to decree the other part to be performed *in specie*.

Dr. Betteworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 66. 3. Bro. Ca. Par. 339.

This question occurred in the case of Dr. Betteworth, and the Dean and Chapter of St. Paul's, and was decided in the house of Lords in favour of a part-performance, on an appeal from a decree of the court of Chancery. The point arose on a lease made by the dean and chapter of St. Paul's, to the master and

[* 32.]

* fellows of Trinity college in Cambridge (in trust for *Doctors Commons*) of the land on which *Doctors Commons* is built, for ninety-nine years, to commence after the expiration of a lease then in being, under a rent of 5*l.* and the doctors giving their advice to the dean and chapter *gratis*, and new building the houses and residence of the doctors there. And in the lease there was a covenant for renewal for ninety-nine years, on surrender of the old lease and payment of 20*l.* in which future renewed lease there was to be the like covenant of renewal on surrender, *toties quoties*. The statute of 13th and 14th Elizabeth was then passed, by which ecclesiastical bodies were restrained from making leases in corporations or market towns, for any greater term than forty years. The lease being near expiring, a bill was filed in the court of Chancery, on behalf of *Doctors Commons*, to oblige the masters and fellows of Trinity Hall in Cambridge, to surrender up the lease to the dean and chapter of St. Paul's and to procure a lease from them for forty years in trust, with the same covenants as in the former lease. And it was contended against the renewal, that this was an entire covenant, and

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and could not be apportioned, and then, the act of * parliament intervening was a release of it. And so it was held to be by Mr. Justice *Price* and Lord Chief Justice *Raymond*, against the opinion of the master of the Rolls, and thereupon the bill dismissed. But this decree of dismissal was reversed, on appeal to the house of Lords, upon the opinion of the judges *seriatim*; and the dean and chapter ordered and adjudged to make a lease for forty years under the ancient rent, with a covenant and conditions as in the old lease contained, except the covenant for renewal.

[* 33.]

So, if the entire performance of an agreement for a purchase be prevented by accident, or the act of God, yet, if the vendee is satisfied with a part performance, the better opinion seems to be, that the court would decree it. And, therefore, although, if one enter into an agreement for a purchase of lands of tenants in common in tail, and one of them die, and then the other institute a suit for an execution as to a moiety, the court would not execute it against the purchaser; because what is required is different from what was contracted for, and the purchaser's meaning might be to have the entire estate; and the court pretends to decree in specie only, which the decreeing * half would not be. Yet, if the purchaser, on the death of one of the tenants in common, who has contracted for a sale of the estate, should bring a bill against the survivor, desiring to take a moiety of the estate only; the interest in the money being divided by the interest in the estate, he might have a specific performance as to a moiety decreed him from the survivor, although the contract could not be executed against the issue of the other.

[* 34.]

The court of Chancery will not compel a purchaser under a decree, or by agreement, to complete the purchase, if there be any substantial doubts as to the goodness of the title of the vendor. And, therefore, where there were the opinions of learned men against a title to an estate, sold before the master under a decree of the court of Chancery; the master of the Rolls would not compel the purchaser to accept the purchase.

Vide Marlow v. Smith, 2. P. Will. 199.

But this court will not suffer a party to defend himself against executing his agreement in specie, upon pretence of some formal matter being requisite to complete the title, where that circumstance is supplied by other matter that makes it equally secure.

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[* 35.]
Colson v. Wil-
son, 3. P. Will.
190.

* Therefore, where one, being in debt, and entitled to the equity of redemption of an estate mortgaged nearly to the value, devised it to his youngest brother, and to his brother-in-law, and their heirs, in trust to sell, and pay debts and legacies, and to pay the remainder of the purchase money, if any, to the testator's eldest brother, who was beyond sea in the service of the *India* company, and died; and the trustees entered into an agreement for the sale, and then the creditors filed their bill against the vendee, under the agreement to compleat his purchase, &c: The vendee, admitting the agreement, and that the will had been proved in the court of Chancery, objected, that the heir, who was beyond sea, though made a defendant, had not appeared or answered the bill, and said, that though he was at first willing to purchase the estate, and had entered on good part thereof, yet, the other part on which he had not entered being out of repair, the tenant racked, and the rents likely to fall, he was now desirous to be discharged of his purchase. And it was argued that he ought so to be, this being a case founded upon a will not proved in equity against the heir, and therefore a defective title; be-

[* 36.]

cause none of the depositions of the * witnesses that had been examined for the will could be read against the heir, and, therefore, he might lie by till they were dead, when he might contest it. But the chancellor, though he admitted that it was proper that a will disposing of lands should be proved in equity, especially in case of a modern will, yet observed, that he could not say this was absolutely necessary to make out the title, any more than it would be to prove a deed in equity, by which an estate should be settled from the heir at law after the ancestor's death, which would certainly be no ground to object to a title. The will prevented and broke the descent to the heir as much as a deed, and the hands of the witnesses to a will might be as well proved in one case as in the other.

Note. This decree was on a rehearing, the former decree having discharged the purchaser from his purchase.
Reg. lib. A.
1732. fol. 574.

Besides, his lordship observed, that the vendee knew the fact of the heir's being beyond sea at the time he entered into the agreement, and yet had not required his joining, or the will's being proved against him; but had admitted by his answer, that the will was duly executed, and had, by entering on part of the estate, executed the purchase. His lordship therefore decreed, that it should be compleated.

The

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* The reporter observes upon the preceding case, [* 37.] that it was a great help to the title that the mortgage, made by the testator, and prior to the will, was for the greatest part of the purchase money, and must be kept on foot for the protection of the title.

And a probable certainty of a good title, is a sufficient ground for the court to found a decree for specific performance of an agreement for a purchase upon; for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title. Therefore, it has been held, not to be an objection to a title, that it is derived under a grant from the crown, in which there is a reservation of tin, lead, and all royal mines within the lands; because, although grants from the crown have, for the most part, such a general reservation, yet, there is no instance, where the crown has had only a bare reservation of royal mines without any right of entry, that it can grant a licence to any person to come upon another man's estate and search for such mines; nor has the crown any such power, neither is it warranted by the royal prerogative of mines: for it would be very prejudicial if the crown could enter into the * subjects lands, or grant a licence to work their mines unopened. But, when they are once opened, the crown can restrain the subject from working them, and can either work them itself, or grant a licence for others to work them.

Vide Lyddal.
v. Weston, 4
Atk. 19, 20.

[* 38.]

Neither are suggestions of there being old entails, *Ibid.* or doubts what issue persons have left, whether more or fewer, objections of that force as to overturn a title to an estate.

The principle, upon which courts of equity decree an agreement or articles to be performed, seems to be; that the purchaser has, by the contract, an equity to recover the land, and the vendor is thenceforward a trustee for the purchaser, or whom he shall appoint, till a conveyance executed.

In all cases of covenants, the court of Chancery, on application to have them decreed in specie, consider what was the intention of the parties covenanting; and, if that was, that the parties should rely and depend upon the security of the covenant only, equity will not alter the security agreed to be accepted of, or vary the remedy: For that would be going beyond,

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[* 39.] beyond, * and, consequently, against the intent of the parties.

Earl of War-
rington v. Sir
James Lang-
ham. Pre. Ch.
89. Et 1 P.
Will. 107. Et
vide Colmer
v. Colmer,
Mofely 118.
Colles's Par.
Ca. 149.

Therefore where A. on his daughter's marriage, covenanted to leave her 1000*l.* to be paid within six months after his death; and his grandson, her representative, filed a bill, praying that A. the grandfather might give security for a performance of this agreement: The court refused to make such a decree, because the daughter and her husband had agreed to accept of the covenant, and equity would not alter the contract of the parties.

Collins v.
Plummer,
2 Vern. 635.
S. C. 1 P. Will.
104. Et Vide
Whitworth
v. Haller,
Mofely 96.
Colmer v. Col-
mer, et al, ibid.
118, 121.

So where a settlement was made on the husband for life, remainder on his intended wife for life, remainder on the heirs of the body of the husband on the body of the wife, remainder to his own right heirs, with a covenant by the husband, that he would not dock the entail, or suffer a common recovery; and the husband, having only one daughter married to C. suffered a recovery, and devised his estate to his daughter for life, remainder to her first and other sons in tail, remainder to his own nephews; provided, that if his daughter survived her husband, she should have the estate in fee: The court, on a bill * filed for that purpose, refused to decree a specific execution; because it was evident from the covenant, that the parties knew the husband had power to bar the estate, and yet agreed to accept of a covenant, by which they might recover damages, and not the thing in specie; and then to have decreed the latter, would have been going beyond the agreement.

[* 40.]

Bosvil v. Bran-
der, 1 P. Will.
461. Sed vide
5 Bro. Par. Ca.
208. Where no
election, et
note the dis-
tinction. Et
vide Blaiker v.
Mathers, 5 Bro.
Par. Ca. 540.
Where, on a
general agree-
ment for a
lease, the house
of Lords held
the landlord
bound to grant
one, without
inserting re-
strictive clauses
of an unusual nature.

So where A. by articles entered into before marriage, covenanted to settle on his wife the manor of *Dale*, or, to leave her 1000*l.* to be paid within three months after his death; the court of Chancery would not, on a bill, exhibited by her, compel A. to do the one or the other, or to give any further or better security for the payment of the 1000*l.*: Because, by the agreement, he had his election all his life-time, and she had that security which she at first agreed to take, and which the court will not better, contrary to the intention of that agreement.

The intent of the parties to an agreement may be evinced, either from the nature of the covenants compared with the substance of the agreement, as was instanced in the case last put, and also in the preceding one

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one of *Collins* * and *Plummer*; or, from the nature of the contract on which the covenant or agreement arises, considering who are the parties to it, and the object of their stipulating. The most apt instances of this sort that occur, are in the cases of marriage articles, wherein, although lands are expressly covenanted to be conveyed to one for life, with remainder to his heirs male of his body, which, on a contract executed, would give A. an estate tail; yet, on a bill brought for the execution of articles, the lands will be directed to be settled upon A. for life, with remainder in *strict* settlement upon his first and other sons in tail male, &c.: Because, from the nature of the contract it is clear, that the issue of the marriage are principally in the consideration of the parties, and that the contract is made with a view to secure to them the estates stipulated about, and of which they are purchasers in consideration of the marriage. It is considered, therefore, that it would be a strange and vain construction of such contracts, if the principal contracting, and who is evidently the person meant to be restrained thereby, should be intended to have such an estate by them, as would enable him the very next day after their execution to defeat, by a fine, the * limitations to his issue, with a view to secure which limitations the contract was entered into, and a valuable consideration paid for it.

And the issue, claiming under such articles, will be entitled to an execution in specie, pursuant to the construction of them as already stated, although a settlement be made thereon; if the limitations therein do not pursue that form.

The first case decided both upon articles and a settlement before marriage, was that of *Honor* and *Honor*; which arose on articles to settle an estate on the father for life, remainder to the heirs of the body of the mother by the father, remainder to the father in fee. These articles had been executed by a settlement made before marriage to the father for life, remainder to the mother for life, remainder to the heirs of their two bodies, which gave the father an estate tail; the settlement was mentioned to have been made pursuant to and recited the articles. And it appearing that the parties did not intend to vary the uses of the articles, and there being proof that a strict settlement was intended, it was decreed, on a bill brought, by the son of

[* 41.]

Trevor v. Trevor, 1 P. Will. 622. 1 Eq. Ca. Abr. 387. S. C. 2 Brown Ca. Par. 122. *Bale v. Coleman*, 1 P. Will. 145. S. C. 2 Vern. 671. *Griffith v. Buckle*, 2 Vern. 13. *Osgood v. Strode*, 2 P. Will. 257. *Nundicke v. Wilkes*, 1 Eq. Ca. Abr. 593. Pl. 5.

[* 42.]

Honor v. Honor, 2 Vern. 658. 1 P. Will. 123. 2 Eq. Ca. Abr. Pl. 1.

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[* 43.] of the * marriage, to have them executed in specie, that the estate should be settled pursuant to the articles, by which the father was only to be tenant for life.

West v. Erifsey, 2 P. Will. 349. 3 Brown Ca. Par. 327.

So, in the case of *West* and *Erifsey*, which arose on a bill to have the benefit of marriage articles, preferred by the grand-daughters of the settler, (who claimed under them by virtue of a limitation in remainder, after two several limitations to the heirs male of the body of their grandfather by his then or any future taken wife) and conceived in the following terms, namely, "remainder to the heirs *female* of "the body of B. by his then intended wife;" which articles had been executed by a settlement, made previous to the marriage but mentioned to have been made in pursuance and performance of the articles, in which this limitation was carried into execution by limiting a remainder "to the heirs of the body of B. by his said wife." B. having issue only a daughter, and being tenant tail by this limitation, suffered a recovery, sold part of the lands, devised the residue, and died. The articles were made in *December*, and the settlement in *March* 1685. The sale of the lands was in

[* 44.] 1698, and the will in 1722. The * defendant pleaded the settlement, the recovery, the will, and the long enjoyment; this plea was overruled, but, at the hearing, the bill was dismissed: But on appeal to the Lords this dismissal was reversed, and the lands not sold decreed to be conveyed to the granddaughters and the heirs females of their bodies, with cross remainders to them in tail female.

Powel v. Price, 2 P. Will. 535. Et vide *Burton v. Hastings*, Gilb. Eq. Rep. 113. 1 Eq. Ca. Abr. 393.

But, in a subsequent case, where a daughter claimed under articles wherein, after a limitation therein to the first and other sons of the marriage in tail, remainder to the heirs male of the body of the husband (i. e.) by any wife, a limitation was made to *the heirs of his body* by his said wife; with a clause therein, that if the husband should die without issue male by his said wife, and there should be one daughter she should have 3000l. and, if more than one, they should have 4000l. among them, which portion was to be secured upon some part of the estate. The husband having suffered a recovery, and re-settled the estates on his second marriage, in which settlement part of them were subjected to a trust for raising 3000l. for his daughter by the first wife, in satisfaction of the portion she was entitled to on the first articles; the

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the court refused to decree * the estate to the daughter by virtue of the articles; distinguishing this case from that of *West* and *Eriffey*, inasmuch as, in the latter case no portion was provided for the daughter of the first marriage, whereas, in this case portions in all events were secured to such daughters; also in the latter case, after the limitation in the articles to the heirs male of the body of the husband and wife, with the remainder to the heirs male of the body of the husband by any wife, came the remainders to the *heirs female* of the body of the husband by the first wife; so that the daughters were more immediately in the view and contemplation of the parties in that than in the present case. [* 45.]

But the solid ground upon which the above case is distinguishable from that of *West* and *Eriffey* seems to be the first; for the argument founded upon the latter ground, appears too nice to be opposed to the substantial principle upon which articles so conceived are carried into execution by strict settlement; for the first limitation being to the first and other sons of that marriage, and the next limitation to the heirs male of the husband, the latter remainder to the heirs of his body by his then intended wife, must have been meant as * a provision for daughters, or have had no signification at all, since it was not to take effect but in failure of sons. [* 46.]

But, if the settlement in such cases, be made before marriage, and be not declared to be in pursuance of the articles, this rule does not apply; because, until the marriage, all parties are at liberty; and, therefore, if the settlement differ from the articles, it will be presumed that the alteration arose from a new agreement between them, by which the articles will be controuled: But that reasoning does not apply, where the settlement is expressed to be made in pursuance of the articles. Vide Logg and Goldwire, cited Ca. T. Talbot. 20.

* And the court, it is to be observed, will not relieve, even in the former cases, if the application be made against a purchaser for a valuable consideration. And, therefore, where the defendant to a bill of this kind was the assignee of a mortgage, and denied notice of the articles or settlement, and insisted on his being a purchaser for a valuable consideration; Lord *Hardwicke* dismissed the bill, so far as it prayed to be relieved against the mortgage. * Warwick v. Warwick, 3 Atk. 291. Note; the articles in this case limited the estate to the use of the heir male of the husband in the singular number, which Lord Hardw. seemed to think would create an estate tail in him; but it was not necessary to determine that

point, and there are very strong grounds in support of a contrary opinion.

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[* 47.] * And, in the case of *West* and *Erissey*, the court ob-
West v. Erissey, served, that purchasers would not be affected, as the
supra, plaintiff *there* prayed satisfaction as to so much of the
estate as was sold against the personal assets of the ven-
Powell v. Price, dor only. So, in the case of *Powell* and *Price*, it was
supra, admitted, that if the trustees under the second set-
tlement, or the wife, had had no notice of the articles
made on the first marriage, they could not have been
affected thereby, in equity, being purchasers without
notice.

Vide 2 Vern. But articles so circumstanced, were decreed to be
564. 2Vez. 633. executed by a strict settlement against the creditors of
one bound thereby; although they had got the legal
estate; for it is, in their hands, bound by all the equity
it was subject to in the hands of their debtor.

White v. Thus, where A. seised in fee of freehold estates,
Thornburgh, covenanted, previous to his marriage, to levy a fine
2 P. Will. 702. thereof to the use of himself for life, remainder to
S.C. Pre. Chan. his wife for life, remainder to the heirs male of his
225. Gilb. Rep. body by his wife, remainder to the heirs of their bodies,
Eq. 107. remainder to his own right heirs; there was issue a son
and a daughter. A. died before any fine was levied;
the son came of age, * borrowed money on bond,
and procured C. D. and E. to be his securities, who
afterwards paid the same. The son, to countersecure
and reimburse them, covenanted to levy a fine to them
and their heirs, redeemable on payment of the money
lent, and what they should pay as his sureties; and,
by his will, devised his lands to them to raise money
to pay his debts, and then died without issue, but
without having levied a fine. And, on a bill preferred
by the sister against the trustees and creditors, to have
the estate conveyed according to the intent of the mar-
riage settlement, the trustees insisted that they were
honest creditors for great sums of money, and had a
security made to them by their testator, on whom the
legal estate had descended, there having been no fine
levied pursuant to the covenant in the marriage arti-
cles; and they suggested that, if there had been a fine
levied, their testator would have been tenant in tail,
and might have barred, as well his own issue, as those
in remainder; and that, he having the fee simple of
the legal estate, and being tenant in tail of the equit-
able estate, the deed of covenant to lead the uses of
the intended fine (although the fine was not actually
levied)

[* 48.]

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levied) was sufficient in * equity to bar it. And that, [* 49.] although their testator had not levied a fine, yet, they had the legal estate in them by the will: and, having both law and equity on their side, ought to prevail against the daughter, who had only a demand in equity by virtue of the father's marriage agreement. But Lord *Harcourt* considered this deed to be in the nature of articles, which would have been carried into execution by strict settlement, and therefore decreed the estate to the daughter; which decree was afterwards affirmed by Lord *Cowper*, but upon different principles.

This rule, respecting the construction of marriage articles, being founded upon the presumed intention of the parties thereto, collected from the nature of the contract and its general object, like every other rule whose basis is laid in presumptions founded on collateral circumstances, yields to positive proof, or to the proof of circumstances furnishing still stronger presumptions, that the intention of the parties was directed to a different object: And, therefore, when it was by marriage articles agreed, that 6000*l.* in the hands of trustees, should be laid out in the purchase of lands, to be settled on the husband for * life, remainder to the wife for life for her jointure, remainder to the first and other sons of the marriage in tail male successively, remainder to the husband in fee; and the father, by the same articles, covenanted to settle, after his decease, other lands upon the husband and the heirs male of his body, remainder to the heirs of the father; the husband's father having made a settlement of other lands to the husband, and the heirs male of his body, with remainder to himself in fee. One question was, whether this were a good performance of the agreement; and if the limitation ought not to have been to the husband for life, remainder in strict settlement? And Lord *King* was of opinion, that the settlement was a good execution of the agreement; for that the lands last settled by the father were not to be a provision for the children of the marriage, they having been taken care of by the other parts of the articles; but were meant for the support and provision of the husband: And his lordship said, that the different manner in penning the articles in relation to the trust money, from that as to the lands, (the one being in strict settlement to the first and other sons, &c. the other to the husband, and the heirs males of

Chambers v. Chambers.
Fitzgib. 127.
S. C. 2 Eq. Ca. Abr. 35. Pl. 4.
S. C. Moseley 333.

[* 50.]

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[* 51.] * of his body generally, without being tied up to the issue of the marriage) plainly shewed, that the parties understood, and had in contemplation, the difference between a strict settlement upon the issue of the marriage, and a general settlement upon the husband, and the heirs male of his body.

Again, if a husband, bound by articles, makes a settlement varying from them, but, afterwards, by will, gives other estates to the heir entitled under the settlement; the heir shall be put to his election, and shall not have a decree for a strict settlement under the articles, but upon the terms of abandoning what he has a claim to under the will.

Streatfield v.
Streatfield,
Rep. T. Talb.
176 et vide
Roberts v.
Kingsby, 1 Vez.
238. et vide 1 P.
Will. 722.

[* 52.]

Thus where A. the grandfather of B. by articles, previous to his marriage, agreed to settle lands to the use of himself and his intended wife for their lives, and the life of the survivor, remainder to the heirs of his body, &c. which were afterwards executed by a settlement reciting the articles, and limiting an estate tail to himself; there was issue of the marriage a son and two daughters. The father, on his son's marriage, settled other lands, of which he was seised in fee, to the * use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with power to raise a portion for younger children. After the son's death, the father levied a fine of the lands comprized in the first settlement to the use of himself in fee, and then devised part of it to his two daughters; and gave all other his estates to trustees, in trust for his grandson for life, remainder to his first and other sons in tail male, remainder to his own daughters. Then came this clause, "and his will and meaning further was, and he did thereby authorize and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend so much as they should think fit for the education of his grandson during his minority; and that the trustees should place out at interest such monies arising out of the rents and profits of the said estates, which said monies, with interest arising therefrom, his will was should be paid to his grandson at the age of twenty-one, if he so long lived; or, in case he died before that age, the same to be paid to his own two daughters, their executors," &c. The settlement being held not to be a proper execution of the articles

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* articles, one question was, Whether the general devise should be taken as a satisfaction for what the grandson was entitled to under the articles? Et *per curiam*, if the grandson has a lien upon the lands in the articles, then he may stand to them if he pleases; but when a man takes upon him to devise what he has no power over, as well as that over which he has power, upon a supposition that his will shall be acquiesced under, the court of Chancery compels a devisee, if he will take advantage of the will, to take entirely, but not partially, under it; there being a tacit condition annexed to all devises, that the devisee do not disturb the disposition which the devisor has made. Then, in this case, the estates which the devisor had given his grandson were clearly within his power; he had given them to trustees until his grandson attained twenty-one, and had disposed of them in such a manner as that there could never be any undisposed residue to go to the grandson as heir at law; then surely it was as much in the power of the court to make this bequest thus limited to be a satisfaction, if the party would stand to the will, as in other cases. And the court said, that the grandson, therefore, must have six months after he comes of age to make his * election, whether he would stand to the will or the articles; and if he made his election to stand to the latter, then so much of the other lands devised to him as would amount to the value of the lands comprised in the articles, and which were devised to the testator's daughters, must be conveyed to them in fee. [* 53.]

But it was held, in the preceding case, that the settlement, made upon the son's marriage, would have been no satisfaction for the estates meant to be limited by the articles; because that deed proceeded upon a consideration quite different from those of the articles, the persons claiming under them being purchasers for a consideration entirely new, the limitations being totally different. It would, therefore, have been absurd to have called that a satisfaction for another thing it had nothing to do with, and to which it was no way relative. [* 54.]

But if such articles be carried into execution by a Reeves v. settlement made after the marriage, and subsequent to Reeves, the birth of a son, and an estate for life only be limited 9 Mod. 128. to him in the settlement, with power to make a joint-
Et vide Matthews's case, cited ibid.
 tenant

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[* 55.] tenant in : of the lands bound thereby, * yet, if such settlement be made with the concurrence of the trustees, being a family settlement, and therefore agreeable to the *substantial* object of the articles, it will be valid as a full execution of the articles ; and a court of equity will not set it aside in order to make the son tenant in tail, although he be thereby prevented from incumbering any part of the lands settled, otherwise than as he is thereby enabled.

Wakely v.
Wakely, cited
9 Mod. 130.

o 2 Vez. 639.
Note. Sir Jos.
Jekyl speaking
of the rule,
" that what
ought to be
done should be
taken as done,"
emphatically
observes, that a
rule so powerful
it is, as to alter
the very nature

[* 56.]
of things, to
make money
land, and, on
the contrary,
to make land
money, 1 Salk.
154. And,
applying it to
the case of
trustees, he
says, that, were
it not for that
rule, it would
be in the power
of trustees, ei-
ther by doing,
or delaying to
do, their duty,
to affect the
right of other
persons. vide 3
P. Will. 215.

* Frederick
v. Frederick,
1 P. Will. 710.
4 Brown's Ca.
Parl. 7.

But where there were such articles and no settlement, but the father by his last will, which he mentioned to be in execution of the articles, devised the estate to his son for life, remainder to his first and every other son, &c. in tail male, with remainders over ; it was held that the execution being by last will, without the consent, of the trustees, and without the consent of the son, who was *then* of age, and by that means deprived of the power of making a jointure, or charging the lands for provision for younger children, the devise should be set aside.

o Courts of equity, in the construction of executory contracts or agreements, consider them as executed from the time of their * being entered into, unless some other time be appointed for executing them ; it being a principle of those courts, *that where one, for a valuable consideration, agrees to do a thing, such executory contract is to be taken as done ; and, that he who made the agreement shall not, by neglecting to perform it, be in a better plight, than if he had fairly and honestly performed, without delay, what he agreed to.*

* Thus, where A. son of B. being about to marry an orphan of the city of London, with consent of parents on both sides, several settlements of real and personal estate were made by B. thereupon ; but, the licence of the court of aldermen, who are the guardians of the city orphans, being necessary, they were applied to for their consent, which they gave *upon* condition that the settlements should be made with the approbation of the common serjeant, A. promising and agreeing, and B. undertaking on his behalf, to take up his freedom of the city *within one year* next ensuing ; of which agreement an entry was made in the court-books. No part of this agreement was performed. And A. made his will and died. His widow then brought her bill to compel a performance in specie of the agreement, it

* having

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* having been entered into for a valuable consideration, namely, that of marriage; the consequence of which would be, that A.'s personal estate would become distributable, one third to the widow, another third to the children, and the remaining third only would pass by the will. And it was, after mature consideration, decreed accordingly; for A. having, upon good consideration, made the agreement to become a freeman, *and having survived the year*, in which he stipulated to carry it into execution, must, in equity, be taken to have been a freeman from the time of the agreement entered into, and his personal estate be distributable accordingly. And this decree was, on an appeal, confirmed by the house of Lords. [* 57.]

And not only the vendor, but all who come in his place, and take in right of *him*, are bound by his agreement; as his widow, where the estate is copyhold and she entitled to free bench, that being a branch of, and arising from, the estate of the husband; or a man's heirs; or his executors; the latter of whom are bound of course without being named. *Hinton v. Hinton, supra.*
Vide 1 P. Will. 721. 2 P. Will. 197.

Upon this principle, namely, *that the whole estate is by the agreement parted with in equity* * (courts of equity considering the thing as done *from the time it ought to have been done*, and, consequently, considering the vendor from *thenceforth* as a trustee for the vendee, and all who come in his place as bound thereby) a bond creditor, who has a lien upon all his debtor's lands of which he dies seised, will, if the debtor *article* to convey his estate, lose thereby his right; for, from the time of the articles executed, it is the estate of another, and not of his debtor. [* 58.]

And the same rule of equity applies in the case of a creditor by judgment, if it be entered up after articles entered into for sale of the debtor's lands, &c. for a valuable consideration *and the money paid*; for the articles bind the estate in equity, and, therefore, must prevail against the claim of any judgment creditor *mesne* betwixt the articles and the conveyance. *Per Lord Cowper, Peach v. Winchelsea, cited 10 Mod. 468.*

But in such case the consideration paid must be *adequate* to the thing purchased; for if the money paid be but a small sum in respect of the value of the land, the purchaser will not prevail against a *mesne* judgment creditor.

* There-

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[* 59.]
 Finch, et al;
 v. Earl of Win-
 chelsea, 1 P.
 Will. 277. last
 edit. et 283.
 note 1.

* Therefore, where A. was jointress for her life of certain lands, remainder in tail to B. her husband, remainder over; and B. entered into an agreement with A. that in case she would make to him a conditional surrender of her estate for life, in order to enable him to charge part of the lands with 6000*l.* after the jointress's death, he would settle the residue, together with the equity of redemption, upon himself for life, remainder to his first and other sons, &c. remainder over; A. surrendered the lands accordingly; B. suffered a recovery, charged the estate with the 6000*l.* and died without ever settling the lands pursuant to his agreement, being at his death indebted by bond and judgment: The agreement was decreed in specie by Lord *Harcourt*, and that decree was affirmed in the house of Lords. A question then arose before Lord *Cowper*, Whether the judgment creditors of A. who were puisne to the agreement, should be paid their debts? And his lordship decreed that they should; for A.'s equity to have the agreement performed, was not strong enough to stand in the way of the creditors, who had a legal lien on the estate; for that, if all the creditors of B. should come in and be paid * their debts, the estate to be settled *would be an overvalue* for what A. parted with.

[* 60.]

It is observable, on the preceding case, that Lord *Cowper* said he knew the inducement to the Lords to affirm the decree for the specific execution of the agreement, was the proposal of the plaintiffs in the suit to pay the debts by judgment and bond, though that clause had been left out in the decree below; which was a strong motive to his lordship to lay hold of this objection of inadequacy of consideration.

But it seems that a mortgagee for a valuable consideration, and without notice, would not be bound by articles of agreement made previous to his mortgage; because, being a purchaser under a contract executed of a trustee in possession *without notice*, he may plead his mortgage against the intended purchaser, or *cestui-que trust*: For his case is distinguishable from that of a judgment creditor, inasmuch as he lends his money upon the title and credit of the land, and is under no obligation to enquire, while he has no reason for suspicion, whether the mortgagor has previously

* trans-

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* transferred his right to another; and, therefore, [* 61.] the money attaches upon the land: Besides, a mortgagee has no other remedy, but a judgment creditor may take out execution against the person or the goods of the party giving it, and his judgment is only a general security, not a specific lien upon the land.

Upon this ground, namely, that the property in an estate contracted for is transferred from the time of the articles made; it is held, that the vendee shall be liable, if there be no laches on the part of the vendor in fulfilling his part of the contract, to all contingencies happening to it, in the intermediate space between the agreement and the conveyance.

Thus, where A. on the behalf of B. articleed to *Cass v. Rudele*, purchase, &c. several houses at *Port Royal* in *Jamaica*, ^{2 Vern. 280.} by which articles C. covenanted to convey, and A. on behalf of B. covenanted to pay 800*l.* for the purchase; one hundred pounds whereof was afterwards paid in part: and then C. filed a bill for a specific performance of the articles. A. the defendant, insisted, that he had not sufficient effects of B.'s in his hands, and that C. had not made out a good title to the houses, by which means * the agreement had not been performed, and that, pending this suit, the great earthquake happened at *Jamaica*, and the houses in question were entirely destroyed and swallowed up; and that, therefore, this agreement ought now to be decreed in specie. But the court of Chancery, notwithstanding the estate *pendente lite* was destroyed and gone, decreed a specific execution of the articles: Which decree, it is said, was affirmed in the house of Lords. [* 62.]

But Lord *Appley*, speaking of this case in that of *Brown's Ch. Pope and Roots*, observed, that it was mis-reported; ^{Ca. 137. in note.} for that it appeared by the printed cases in the house of Lords, in *December* 1692, that a title was made by C. in *January* 1691, by conveyance executed, and the earthquake did not happen till *July* 1692; that A. admitted he had the 700*l.* in his hands; and that the decree was founded on a good title to the premises having been conveyed to A.

However, although the preceding case, as stated by Lord *Appley*, does not support *Vernon's* report of it, yet, the general principle seems founded

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[* 63.] in reason, and is supported by * other authorities equally respectable. For it is clear, that property abstracted from possession, being a moral right, may pass by a bare agreement, and that the vendor's retaining the possession of a thing under contract of sale until a future time, does not prevent the right of property from being instantly transferred to the vendee. The right, and the enjoyment of the right, are two distinct things, as is the contract and its execution. Nothing more is requisite for transferring the right of property but the assent of the proprietor, and that assent has its full effect the moment the contract of sale is made, and divests the vendor of his right of property in favour of the vendee, *unless it be otherwise agreed*. But the enjoyment of the right, which relates to the execution of the contract, may be suspended until the vendor has laid down the money agreed on, or on any other account, and the vendee will not thereby be less the proprietor of the thing sold. In such case the seller, from the time of the bargain made, is, as it were, indebted to the buyer for a thing in kind, and therefore cannot be affected by any accidents arising *without any fault in him*.

[* 64.] * The course of authorities, so far as they go, are agreeable to the principles above stated.

Reeves's Hist.
Comm. Law,
373, 374. Man-
ning's case,
2 P. Will. 411.

Thus, where a man seised of land in *jure uxoris* sold four hundred oaks for 20*l.* and half were taken during the life of the wife, and then she died, and the baron not being tenant by the curtesy, the heir entered, and the husband brought an action of debt for the remaining half of the money (the other half having been paid in the wife's life when the trees were removed); it was held by the whole court, that the action lay: Because the contract was good at the time of the bargain.

Ibid.
18 Ed. 4. 5.

In like manner it was held, that, should a horse, after being sold, die in the stable of the vendor between the sale and the delivery, the vendor might have debt for the price. It was at the pleasure of the vendor to retain the horse till he was paid the price, and yet he could not have an action of debt till the horse was delivered; the property, however, was in the buyer by the bargain, so that if he tendered the price, and it was refused, he might take the horse, or have detinue for it.

So

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* So where one by articles, reciting that he had an estate in a church lease, covenanted to convey his title to the same by such a day to another, as the covenantee's counsel should advise, and it happened that, after the articles, and before the time appointed for the conveyance, one of the lives dropt; the question was, Upon whom the loss should fall? And it was decreed by the lord keeper, that, in regard here *was no default in the seller in making the conveyance*, the loss of the life ought to be borne by the purchaser: Upon the same principle on which it would be held, that if the reversioner had articulated to sell the reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should then have the benefit of it.

[* 65.]
White v. Nutt,
1 P. Will. 61.

And where the bill was to be relieved against a contract in writing, on which a judgment had been obtained, and damages given, and which was for the sale of eleven shares of the Lustring Company, at 58l. a share, with the 10l. per cent. which the company had called in, and which the seller had agreed to pay; the articles were dated the 10th of August 1720, and the money was stipulated to be paid on the then next opening of the company's books, * at which time the defendant was to transfer the shares to the plaintiff; the scrivener drew the articles according to these instructions; but at the meeting of the parties in order to seal, the defendant, the seller of the stock, insisted that he would not sell, unless the plaintiff would agree to pay the purchase money at all events at such a day certain, *whether the books did then open or not*; and, the stock being then risen, the plaintiff consented to execute an indorsement on the articles to that purpose; which articles and indorsement were executed at the same time in a tavern: On the 20th of August, a *scire facias* issued to repeal the patent granted to this company, and at the same time a proclamation was published to forbid proceeding in transfers; and an act of parliament afterwards passed, making it a premunire to have any dealings with these bubbles; the company remitted the call of 10l. per cent. and, in lieu thereof, accepted 2l. per cent. but never afterwards opened their books; nor, as their own secretary deposed, were they ever likely so to do: Although the Master of the Rolls considering it as against natural justice that any one should pay for a bargain that he could not have, and

Stent v. Bailis,
2 P. Will. 217.

[* 66.]

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[* 67.] that there ought to be a *quid * pro quo*, whereas, in this case, the defendant had sold the plaintiff a mere bubble or moonshine, and a thing which it was impossible should ever be made good to the plaintiff, it being clear that the company could not justify any more transfers) held, that the money could not be said to be due in conscience, supposing the plaintiff incapable of coming at that which he had contracted for, and in consideration whereof he was to pay his money, and thereupon decreed a perpetual injunction and satisfaction to be entered upon the judgment; yet Lord King, on a re-hearing, recommended the parties to share the loss, and it was agreed accordingly.

Mortimer v.
Capper, Bro.
Rep. Ch. 156.
Et vide Bald-
win v. Boulter,
cited ibid.

And in the case of *Mortimer and Capper*, where C. contracted to sell M. a piece of ground for 200l. and 50l. a year annuity to the vendor for life, the vendee to pay M. a mortgage thereupon; and C. was found drowned two days after the contract was reduced into writing; a bill was filed against the heirs at law of C. for a specific performance. The agreement appeared to have been fairly made, with the approbation of C.'s family; but it was objected, that no payment of the annuity having been ever made, the * contract was void. *Sed, per* Lord Chancellor, To decree for you I must lay down as a rule, where a bargain depends upon a contingent event, which chance both the parties know; that, if the chance turns out against one of the parties, he must be discharged from his contract. This contract cannot be impeached on any other ground, than that the annuitant died before payment; that the bargain has turned out all advantageous to one party, which was supposed to have been fortuitous. Enquiry must be made as to the value of an annuity for the life of C. in order to introduce the question, Whether an estate being disposed of for an annuity, which is a contingency, the contract shall fall to the ground if no payment of the annuity shall be made? I think, if the price was fair, the contract ought not to be cut down, merely because the annuity, which is a contingent payment, never became payable.

Supra, v P.
Will. 62.

But *Wright*, Lord Keeper, seemed to be of opinion, in the case of *White and Nutt*, that if, in that instance, all the lives had dropt before the execution of the conveyance, it might have been another consideration; for, that the money was to be paid upon the
* conveyance;

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* conveyance; and, as no estate would then have been [* 69.] left, there could have been no conveyance. And Sir Joseph Jekyl, Master of the Rolls, put a similar instance in the case of *Stent* and *Bailis*; for he observed *Supra*, 2 Will. that, if he should buy a house, and, before such time ^{220.} as he, by the articles, was to pay for the same, the house should be burnt down by casualty of fire; he would not in equity be bound to pay for the house, and yet the house might be built up again.

Now it is observable upon the preceding *dicta*, for they amount only to instances put by way of illustration, that the validity of Sir Joseph Jekyl's decision, in conformity to the case he here puts, was doubted of by Lord King, in consequence of which a compromise took place; and that Sir Nathaniel Wright founded his observation on the ground, that the money was expressly stipulated to be paid *on the conveyance being made*, but this seems not to be putting the case fairly; for the same observation would have applied with equal force to the case there in question: Because, if the contract be to be viewed in that light, the stipulation was, to convey the estate in the condition which it was in at the time of the * bargain made; and I should apprehend that, to have [* 70.] maintained an action upon a covenant to pay on conveyance *actually* made, it must have been averred, that the vendor had conveyed an estate for three lives, and that the lives were in *esse*. But the true principle seems to be, that, in equity, if the party agreeing to convey have a good title, and be able so to do at the time of the bargain entered into, and be clear from the imputation of delay in performing his part of the agreement, the contract is there considered as *then* executed; the subsequent conveyance being only matter of form, the substance being the bargain. From that instant then the property is changed, and whatever casualties fall thereupon should, it seems, be borne by the new owner. Suppose the money, to be paid for the bargain, be in such a predicament as to be clearly identified; as if it were, by consent of both the parties to the agreement, deposited with a third person in two or three bags, to make good the payment on conveyance made, and any casualty happen to it, as if for instance, one of the bags were stolen; it seems clear that, upon the principle of the case of *White* and *Nutt*, the vendor must be the loser, for the subject seems immaterial if the

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- [* 71.] * the agreement attaches upon it, and it be bound by the bargain. Suppose the conveyance were made, and the holder of the money refused to deliver it, would not the vendor be the proper person to bring trover for it? for, in consideration of the conveyance made, it is become his money in law; therefore what the actual conveyance effects, at law, the agreement effects in equity. If this reasoning be just, what difference could it make if two bags were lost and the third remaining? it is submitted it could make none; for it is not the quantum of loss that must decide who is to bear it, but the ownership. The *maius* or *minus* must be immaterial. Then, if the whole money were lost, being actually identified and proved to be that bound by the contract, the principle would not be thereby altered. The vendor would be the sufferer. Is it not equal equity then, that, if the lands were lost, the vendee should stand to the damage? This is precisely agreeable to the reasoning of Sir Nathaniel Wright in the same case; for he says, the vendee shall take it, though a life be fallen, in like manner as, if the articles had been for sale of a reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should have had the * benefit of that; for, says he, in such case, in equity, the estate is *as conveyed* from the time of the articles sealed. Why then, if that be true, and both lives upon which the reversion was expectant had fallen, the vendee must have had the benefit? because the number of lives falling could not have altered the principle, *that the estate was, in equity, as if conveyed ab initio*.
- [* 72.]

Manning's
case, 2 P. Will.
411.

Lord Thurlow, speaking to the defendant's counsel, in the case of *Mortimer and Capper*, says, "to decree for you, it must be laid down as a rule, that where a bargain depends upon a contingent event, which chance both the parties know, if the event turns out against one of the parties, he must be discharged from his contract. Then it is to be impeached upon this ground, namely, that the bargain has turned out all advantageous to one party which was supposed to be fortuitous;" and the Chancellor concludes with saying, "that if the price be fair, the contract ought not to be cut down merely because the annuity, which was a contingent payment, never became payable." Would not the same reasoning have applied to the case of *White and Nutt*, supposing all the lives had died? That bargain

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* bargain was, for an estate determinable upon the contingency of three lives being exhausted, which chance both the parties knew. Why then should the contingency of all the lives dying in one case vary the contract, more than the contingency of the annuitant's life failing in the other; or, why should the fact of there being no estate to convey at the time of conveyance, in one case, affect the principle more, than the fact of there being no annuity to pay at the time of the conveyance should affect it in the other?

[* 73.]

But, it may perhaps be said, that there is an evident distinction, not only between a contract for sale of an annuity, and one for sale of an estate for lives, but also between those contracts and a contract for sale of an absolute estate; for the former are, upon the face of them, contracts for contingencies, the latter is not so. I confess such an observation would not furnish in my mind any ground for a distinction. An annuity is determinable by the casualty of the life during which it is payable falling in; an estate for lives is in its nature to cease, when the lives during which it is to continue no longer exist; an absolute estate in lands is also exposed to those convulsions of nature to which the land that is the subject of * it is liable; and a house may be consumed by fire. Every one who treats respecting either of these subjects must be aware of these chances, and being aware of them must be considered as making his bargains with the full knowledge of the possibility of their happening; the only difference seems to be, that some of the casualties are more probable to happen than the others: But all are equally incidental to the several subjects exposed to their influence.

[* 74.]

If any distinction can be made in the cases put, it seems to me that it must be in favour of the vendor of the absolute estate in lands swallowed up by an earthquake, or of the house destroyed by fire, and not in favour of the purchaser in consideration of a contingent payment (as of an annuity) whereon, by reason of the death of the annuitant, nothing becomes due; for such a case, it appears to me, might be fairly contended to fall within the distinctions I have before mentioned, where that party who has performed, and by the same reason where that party, who is ready to perform his part of the agreement, is in *statu quo*: As in the cases of Lord *Feversham* and *Watson*, and of *Powell* and *Pellet*;

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[* 75.] *Pellet*; because the * seller of the annuity has paid nothing; he has done nothing towards performance of his part of the agreement; and it is become impossible, as to part, that he should: The contingent payment never commenced nor can commence, neither does it admit of compensation; where then is the equity of his case? If he brought an action upon the agreement, he could shew no real damage; he could therefore recover only a nominal one. We are to recollect, in considering these kind of cases, that the interposition of the court is discretionary, and the title to demand it, is to be raised on an equity derived from circumstances. That, therefore, although that discretion be not arbitrary, so as for the court to be warranted to deny its interposition where that equity is to be found, yet, it is absolutely arbitrary, when all the circumstances of the case do not concentrate to raise that equity. Minute incidents then may, in some cases, turn the balance either way. Nothing can afford a stronger ground to refuse the aid of the court, than that it is impossible for the one party to have a compleat performance, and that the other, who seeks for it, is in precisely the same predicament as he was at the time at which he entered into the agreement.

[* 76.] * But the case is different as to the vendor of an estate swallowed up, or house burnt down; because, had he not been bound by the agreement, he might have sold this property, to others, and the conveyances might have been sooner compleated; the parties contracting are not in the situation they were in at the time of the contract made; it ought therefore, in equity, to be rendered efficacious *ab initio*, thereby to determine on whom the casualty shall fall. If, after such a contract, and before its completion, an accident happened favourable to the holder of the lands; as if an earth useful in a particular manufactory were discovered in the neighbourhood, or any other collateral casualty of the like nature, the vendor would notwithstanding be bound to his bargain; surely then it is consistent with equity, that he should not suffer by a casualty operating against the vendee.

Pope v. Roots,
7 Brown's Par.
Ca. 148.

As to the case of *Pope* and *Roots*, that seems to me to fall within another principle of equity. There A. seized in fee of certain tenements then in mortgage, being sixty years of age, and in perfect health, with a view to increase his income for his life, in July 1770,
by

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by agreement in writing, contracted with B. * in consideration of 1s. and of an annuity of 70*l.* payable by B. as therein mentioned on or before the 1st day of *October* then next ensuing, to convey those tenements to him and his heirs free from incumbrances; and it was agreed, that A. should receive the annuity from the 5th of *April* then last past, and B. should take the rents and profits of the tenements from the same day. This agreement could not be performed at the day, by reason of the indisposition of the mortgagee, and two days after, viz. the 2d of *November*, A. met with a hurt on horseback, that occasioned his death on the 12th of the same month: Then B. instituted a suit against the representative of A. for a specific performance of this agreement, offering to allow them the half yearly payment of the annuity of 70*l.* that became due on the 5th of *October* preceding A.'s death. It was objected, that the agreement was unfair and unreasonable, it being proved that, at the time of making, it was a very hard bargain; for the estate was then worth upwards of 800*l.* and the annuity might have been bought for less than 590*l.* And that an annuity of 95*l.* for the life of A. instead of an annuity of 78*l.* supposing him to have been in full health, would have no more than a * reasonable consideration for the purchase of the estate in question. *Besides, it was said, that B. had not carried the agreement into execution on his side, by paying the annuity on the 5th of October, when it became due; and on these grounds the plaintiff's bill, so far as it sought a specific performance, was dismissed, and that dismissal affirmed on appeal to the house of Lords.*

[* 77.]

[* 78.]

Now, although inadequacy of price alone is not, when all parties are informed respecting that about which they are contracting, a sufficient ground for a court of equity to refuse to give its sanction to a contract, unless the consideration be inadequate in a degree that will warrant the court to conclude fraud from the *internal evidence* the transaction itself furnishes, yet it is a strong inducement to a court of equity to seize upon any other ground that the case may furnish; which, coupled with that, may warrant it to refuse its interposition. And, therefore, the court of Chancery, and also the house of Lords, coupling together the inadequacy of the price, and the omission on the part of the purchaser of the estate to perform his part of the contract by payment of the annuity, when the first half year became

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[* 79.] came due, * considered him as not intitled to the favour of a court of equity; in which way of taking up the question they were warranted, as well by the principle that governed Lord King in the case of *Powell and Pillet*, as by that which influenced Lord Cowper in the case of *Finch* and Lord *Winchelsea*.

Supra, Gilb.
Rep. Eq. 183.
Supra, 1 P.
Will. 277.

But if the transaction be not a contract of sale, properly so called, but an agreement which obliges the parties to make such a contract at a certain or uncertain time, then the seller remains proprietor of the thing sold, and is consequently liable to accidents and casualties. The effect of such an agreement being merely, that the seller engages, First, Not to make a contract of sale with another, in regard to the thing bargained for, before the time limited is past; and, Secondly, To deliver the thing at the price agreed on, when the contract of sale shall be completed by the performance of the obligation on both sides.

Where money is appropriated to be invested in lands, and, by unforeseen accidents arising from no neglect of any party interested, it * suffers a loss, the parties intitled and interested therein must contribute equally.

Chambers, et
al. v. Cham-
bers, et al.
Moseley 333.
S. C. Fitzgib.
137. 1 Eq. Ca.
Ab. 115, 116.
Viner tit. Con-
tract 513. Con-
tribution 567,
568.

Thus where A. on marriage of his son I. with E. covenanted, by articles, in 1718, to add 3000*l.* to the portion of E. which was 3000*l.*; and that the 6000*l.* should be paid into the hands of trustees to be invested in a purchase of lands to the use of I. for life, remainder to E. for life, remainder in strict settlement; and two terms were to be limited to trustees, one to raise 2000*l.* for the portions of younger children, payable at twenty-one or marriage, or 1000*l.* for the portion of a younger child, the other for raising 3000*l.* for the portions of daughters in case there was no issue male of the marriage; and the money was to be put out on government or other securities, at the discretion of the trustees, until a proper purchase could be found; and the interest of the money was to go as the lands when purchased: The money, which stood out in South Sea annuities, was, in 1720, subscribed by the trustees into the South Sea Company, and by the loss of that year was reduced to about 3000*l.* Then the eldest son filed his bill against the trustees, his father,

mother,

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* mother, brothers, and sisters, to have the money laid out in a purchase of lands, to be settled pursuant to the articles; and that the shares of the younger children might abate in proportion to the loss. And it was argued, that this loss could not fall upon the trustees, for not only the act of parliament respecting the South-sea company indemnified the trustees, but the articles also authorized them to place out the money as they pleased. That therefore the justice of the case was, that the younger children should abate in proportion with the elder son; and as by the articles they were, if there was a son to have one-third of the whole money, so they ought to have the same proportion of what was left. On the other hand it was contended on behalf of the younger children, that there was no case in which such a loss had been decreed to fall on one that had a charge on the inheritance; that the charge was certain, the value of the lands to be purchased was uncertain; the charge remained the same, whether the lands to be purchased were of more or less value; and that the money being to be laid out in lands was to be considered as a real estate, and if the lands had been purchased and fallen in value, yet this certain pecuniary charge must have been * raised; that the money, at the time of the articles entered into, was invested in South-sea annuities, which might fall in value, yet the parties had not provided for an abatement if such a case happened; that, suppose the stock had risen according to the expectation of the parties, the younger children would have been no gainers by the rise, but the plaintiff would have had all the benefit, so by parity of reason he ought to bear the loss; so if the money had been laid out in lands, the mines, escheats, and other casual profits, would have been his. But the court distinguished between cases where the money had been invested, and this case. Here the money had not been laid out in a purchase, and a deficiency had happened by placing it out in a lawful way allowed by act of parliament, which includes the consent of every one; and the trustees had the authority of the parties to dispose of it at their pleasure. If any gain had been made it would have gone to all the children in proportion, as had been judged in the court; then, if a loss had happened, if the same proportion of what remained were given to the younger children, they had all that was designed them; the parties to the articles

[* 81.]

[* 82.]

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[* 83.] articles never designed that the younger children should have two-thirds of * the money, but one-third only; and they designed to provide for all the children, and therefore the younger children must abate in proportion to the loss.

Having considered the principles by which courts of equity govern themselves in the exercise of their jurisdiction in decreting contracts in specie; I shall next call the reader's attention to the effects and consequences which flow from this head of equity.

The principle, upon which this equity is founded, being the rule, that whatever is stipulated to be done shall be there considered as done; it follows, as a necessary consequence, that money contracted to be laid out in lands, being from the time of the contract bound thereby, must, from thenceforth, be taken as land.

And the same principle will equally apply *vice versa*; namely, that lands, by agreement stipulated to be turned into money, shall from thenceforth, being bound thereby, be taken as money; and, therefore, if a man by articles agree to sell his estate, and part of the money be paid, and then he die before the * conveyances are perfected, and the vendee is willing to be off his bargain and lose the money already paid, and the heir of the purchaser likewise desires that the bargain may not proceed; yet, if the executor of the vendor prefer his bill against the purchaser and the heir of the vendor to have the conveyance compleated, and the residue of the money paid to him, a court of equity will decree it: Because, from the time of the bargain, the land of the vendor is to be looked on in a court of equity as money, and to belong to his executors; for he by his bargain has turned it into money.

But this rule of equity only applies, where the contract to turn land into money, or money into land, is positive; for, if a power of election be left in one of the parties, there, he must, by some act, shew his intention to change the subject from what it is, or a court of equity will not consider it otherwise, than as in its proper shape: Therefore, where A. gave B. 500*l.* in trust, that B. should lay out the same upon a purchase of lands, OR put the same out on good SECURITIES for the separate use of his daughter H. (the plaintiff's then wife) her heirs, executors, and administrators, and died in 1729, and H. the daughter died in 1731,

Gilb. Hist. Ch.
243, Lord
Pembroke v.
Boden,
Ch. Rep. 115.

[* 84.]

Curling v. May,
M. term,
8 Geo. II.
cited 3 Atk. 256,
et vide Kettleby
v. Atwood,
1 Vern. 298.

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1731, without * issue, before the money was vested [* 85.] in a purchase; and the husband, as administrator to his wife, brought a bill against the heir of H. for the money, the money was decreed to him: For it was said, that, the wife not having signified any intention of preference, the court would take it as it found it; that, if the wife had signified any intention, it should have been observed, but it was not reasonable then to give either her heir, or administrator, or the trustee liberty to elect: For, Lord *Talbot* said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention.

And to entitle the heir to claim money as land, or the representative of the personal estate to claim land as money, or, to speak more properly, to claim money arising by sale of lands as personal estate, one or other of the contracting parties in the agreement for purchase or sale must be entitled to carry it into execution in a court of equity; for where such court holds, that the agreement ought not to be executed, there is no conversion of personal into real estate, or real into personal estate in consideration of the court: Because, * if [* 86.] the subject being land be not effectually converted into money, or being money be not effectually converted into land, it must be considered according to its original nature; and the executor in the former case, and the heir at law in the latter, must have the benefit of it. Now, whether there be any such conversion depends on there being an effectual agreement, binding on all parties; so that, under all the circumstances, it ought to be carried into execution upon the general principle of equity before alluded to, that what is contracted for valuable consideration to be done, will by courts of equity be considered as done; all the consequences following, as if it had actually been so, and as if a conveyance had been made of the land at the time to the vendee. But, if the circumstances be such, that the agreement cannot, when application is made to a court of equity, though once it might have been, or ought not to be carried into execution, these consequences cannot follow; for the court must *then* consider the subject to be land or money, as it is in its proper and original shape.

Money to be laid out in lands, may be in three predicaments.

First,

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[* 87.] * First, It may consist of a particular fund placed in the hands of trustees in trust for third persons, according to the limitations stipulated in the articles or agreement respecting it. Of this kind is the case of *Kettleby and Atwood*.

Infra.

Secondly, It may consist of a particular fund, remaining in the hands of the person bound by the limitations stipulated in the articles or agreement respecting it, and by covenants therein. Of this kind are the cases of *Knights and Atkins*, *Lancy and Fairchild*, *Scudamore and Scudamore*, *Disher and Disher*, *Furham and Jones*, *Edwards and Lady Warwick*, and *Letchmere and the Earl of Carlisle*.

Infra.

Thirdly, It may consist of money vested in no separate or particular fund, but mixt with the general fund belonging to the contractor respecting it, or of the person claiming by virtue of the stipulation in the articles. Of this sort is the case of *Chaplin and Horner*.

Infra.

Per Lord Parker, Chan. afterwards

[* 88.]

created Lord Maclesfield, vide Pre. Chan. 544. *Chaplin v. Horner*, 1 P. Will. 483.

In which ever of the last mentioned predicaments money to be laid out in lands is, it is nevertheless a declared rule of the court of Chancery, acknowledged as such as early as * the year 1720, that it is to be looked upon as land; and, therefore, if the grantee thereof die before a purchase made, or payment to him of the money, so that it becomes a question between his heirs and executors, which of them shall have the money? the heir shall be preferred, and it shall, for his benefit, be considered in a court of equity, as if the purchase had been actually made in the life of his ancestor for two reasons: Namely, First, Because the heir is favoured in all cases rather than the executors. Secondly, Because, if the executors should have it, it would be against the intent of the grantor, who meant to give it to the heirs.

Thus, where, by articles made upon marriage, it was agreed, that, the wife having 1500*l.* portion, the husband should add 500*l.* more to it, and that the same should be deposited in trustees hands, until a convenient purchase could be found out for investing it in land; which land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to their first and other sons in tail, remainder, &c. *remainder to the right heirs of the husband*. And, in the articles, there was a proviso that,

Kettleby v. Atwood, 1 Vern. 298. Hill. 1684. Ibid 471. Mich. 1687. S. P. in *Lingen v. Sowray*, as to part of the securities for money. Vide infra, et 1 P. Will. 172. Mich. 1711.

in

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* in case the husband died without issue, the wife might make her election whether she would have the land or money, and had six months time to make her election in. The husband died before a purchase made, leaving the wife enfeint of a daughter born soon after his death, and who died at a month old. The wife was administratrix to both husband and child, and made her election within six months to have the money; and gave notice thereof to the brother of the husband who was his heir. He thereupon filed a bill to have the 2000*l.* invested in land, and settled according to the articles. ^h Lord Keeper *North* dismissed the bill with costs, saying, that had a bill been brought in the lifetime of the infant, it being better and safer for the infant to have the land than money, he would have decreed the money to have been laid out for the benefit of the infant; ⁱ but that he did not see what equity the heir had against the administratrix. But on a rehearing this decree was reversed; because, the husband having issue at his death, he could not be said to die without issue, and, therefore, no election could arise to the wife.

* So, in the case of *Lancy and Fairchild*, * money, ^l being by marriage articles to be laid out in land, and settled on the husband and wife and their issue, remainder to the heirs of the wife, was, the wife dying in the life-time of the husband, decreed to go to the heir of the wife, and not to her administrator; ^m the money being bound by the articles, according to the resolution in the case of *Kettleby and Atwood*.

ⁿ Again, where D. a freeman of *London*, being possessed of a certain sum *per annum* upon bankers assignments (which were established by act of parliament, and were therefore to go to the executor) previous to his intermarriage with E. and in consideration thereof, assigned over these annuities to trustees in trust that they should pay and apply these yearly annuities to such persons as should be entitled to the profits of his lands, which he had conveyed to the same trustees to the use of himself for life, remainder to his wife for life, remainder to his first and other sons, &c. remainder to himself in fee; and directed that, in case the principal should be paid in according to the act of parliament in that behalf made,

[* 89.]
* Vide *Hancock v. Hancock*, 2 Vern. 605. Hill. 1707. where the wife actually had an election, and yet the money was directed to be laid out in land; because she then had issue, and it was more beneficial for them.
ⁱ Note. The case of *Goodiar v. Clarke*, 1 Sid. 102. was cited, per curiam, wherein *Windham*, Just. cited the case of *Bret and Pildridge*, on a deed with a proviso, that if a man's daughter should die without issue

[* 90.]
sue within two years from her marriage, her husband should repay part of her portion; the daughter had issue, and she, and her issue, died within two years, and adjudged that no part of the portion should be repaid, because by her having had issue, the condition was fulfilled.
* *Lancy v. Fairchild*, 2 Vern. 101. East. 1687.
^m *Supra*.
* *Dithers v. Dithers*, 1 P. Will. 204. Trin. 1712.

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[* 91.] made, that then the trustees * should lay out the monies in the purchase of freehold or copyhold lands to be settled to the same uses. Afterwards D. died without issue. And, on a bill brought by the brother and heir of D. against his widow and executor, it was decreed, that these annuities, being redeemable by parliament, were as a mortgage assigned to trustees and directed, when paid in, to be invested in a purchase, and settled as the fee-simple lands were above settled; and, therefore, though the wife was to have an estate for life in the annuities by her jointure deed, yet, after her death, the annuities should not be looked upon as personal estate, a moiety of which, on such construction, would, by the custom of *London*, go to her representatives, but as money directed to be laid out in lands, and to be as a real estate, which, after the wife's death, would go to the heir of D.

In the case of the Countess of Holderness v. the Marquis of Carmarthen, a perpetual annuity of 4000*l.* issuing out of the revenue of the post-office (but redeemable upon the payment of 100,000*l.* out of the exchequer, when the state of affairs would permit, which sum, when paid, was to be laid out in the purchase of lands to be settled in manner therein mentioned) was not considered as money to be laid out in land,

And the law will be the same, if the person appointed to lay out the money die before it be done, and neither the executors, nor any other person, be named by the grantor to invest it; because, otherwise, it would put it into the power and election of the trustee to decide who should have the benefit of it: For, if the purchase were

[* 92.] made, it must go to the * heir, but if the trustee, by delaying the purchase, might alter the right and give it to the executors, it would be governed by his will and inclination, and not by the will and inclination of the grantor, which would be very unreasonable and inconvenient. And, therefore, although the trust for laying out the money be personally confined to the grantee, without naming executors, yet, they shall be considered as implied and included in it.

Scudamore v. Scudamore,
Pre. Ch. 543.
Mich. 1720.

Thus, where A. by her will in 1696, gave the sum of 8000*l.* to her daughter B. to be laid out by her in a purchase of lands, to be settled to the use of herself for life, remainder to C. and his heirs, and, in case he died in the life-time of B. to D. his heirs, executors, and administrators. C. died in the year 1714, and in the life-time of B. and D. in the year 1716, living B. having, about three months before his death, made his will, and E. his lady, executrix, and having given several legacies, and leaving F. an infant, his only daughter and heir at law. In the year 1717, B. died. The money had never been laid out. A bill was brought by E. against F. and against the executors of B. to have the money for the benefit of the executors and legatees

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* of D. and that no purchase might be made for the benefit of F. the heir at law of D. And the lord chancellor was clearly of opinion, that the money belonged to F. the heir at law, as the lands would have done, if a purchase had actually been made as it ought to have been by B. the trustee. And his lordship decreed accordingly. [* 93.]

In the preceding case the court observed, that the case was the stronger because F. the heir at law, was an infant; and as B. survived D. two years, the infant heir might have brought her bill against B. herself, the trustee, to have had the purchase made; and her laches in not doing so, was not to turn to her prejudice, being an infant.

And, although the limitations in marriage articles go no further than to the heirs of the body of the husband and wife, yet, courts of equity consider what is the effect and consequence of the settlement; namely, that it is to give to money the properties of land, and as, had it been land, it would descend to the heirs general of the husband (i. e.) supposing it came from his ancestors; so, although in fact it be money, yet being in equity as land * it will descend in the same course as land would. [* 94.]

And, although money to be laid out in land come, in truth, wholly, or in part, from the wife, yet, if no provision be made in what channel it shall go after failure of issue of the marriage, courts of equity will give it to the heir of the husband, upon a presumption, founded on the general practice in such cases, that it was so intended.

The following case will illustrate both the foregoing propositions.

Upon the marriage of A. with B. daughter of C. it was agreed, that C. should give B. a portion of 1500*l.* and that A. should put 1500*l.* more to it, and that both sums should be laid out in the purchase of lands to be settled on A. for life, remainder to B. for life for a jointure, and on the heirs of their two bodies. A. died without issue, and B. married P. and died. Then the heir of A. brought his bill to have the money owing by B. (together with 1500*l.* more which he offered to lay down) laid out in a purchase according to the mar-

Knights v. Atkyns, 2 Vern. 20. 1687.

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[* 95.] riage agreement. It was contended * on the part of P. the husband and administrator of B. that, as there was no mention in the marriage agreement how the remainder in fee should go, and as, the wife's portion being equal to the money laid down by the husband, it would have been reasonable, if a question had been made in this court, how the remainder should have been limited in the life of the parties, to have decreed it for the right heirs of the survivor, therefore, the purchase having never been made, and the wife surviving, she was entitled, in equity, to the whole money, and that her husband, as her administrator, had the same right, if not to the whole, at least to a moiety which was her own proper portion. But it was decreed, that what remained due from C. should be paid to the heir of A. the first husband.

And the better opinion seems to be, that, although a purchase be to be made with the consent of the husband and wife, and one of them die before the money be invested; yet it shall be subject to the limitations in the agreement, and, in default of issue, go to the representative of the husband.

[* 96.]
Symons v. Rutter, 2 Vern. 227.
East. 1691.

Thus, where, on the marriage of S. with R. * it was agreed, by articles, that 500*l.* part of the portion of S. should be placed in trustees hands to be invested in a purchase (with the consent of S. and R.) of houses or lands of inheritance, to be settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the body of S. remainder to her brother and his heirs. The interest, until a purchase had, to go as the rents and profits would go afterwards. S. died without issue before the money was laid out, then R. died, and afterwards the brother of S. claimed the 500*l.* by virtue of the remainder to him and his heirs. *Et per Trevor and Rawlinson*, the 500*l.* must, in this case, be looked upon as money, and not as land, and go to the administrator of R. the husband, who survived. First, Because there was no positive covenant that it should be laid out in land. Secondly, Because it was to be laid out in land, *but by consent of R. and S.* and there had been no purchase made or consented to, and, therefore, it remaining as money, the interest by the articles was only appointed to the survivor, and no disposition was made as to the principal; *that*, therefore, must go to the administrator of the husband who survived, and who, if it had been settled, would have been

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been tenant * in tail, -and might have barred the issue. [* 97.]
And the bill was dismissed.

But, *Hutchins* was of a contrary opinion in the preceding case; for he said the intention was plain that the money should be invested in a purchase, and it was plain that a purchase might have been made after the death of one of them, because the survivor, by the articles, was to have only the interest for his life; and though, if settled, the husband might have been tenant in tail, yet, he having no issue, would have been only tenant in tail after possibility of issue extinct; and, therefore, this cause must be governed by the rule that had been taken in the several cases of *Whitwick* and *Jermin*, *Lawrence* and *Beverly*, *Annand* and *Honeywood*, and *Kettleby* and *Atwood*, and money must not, in this case, be taken as personal estate, upon the same circumstances which, in other cases, had made money be considered as land, and to go as real estate.

And the opinion of *Hutchins*, in the preceding case, has been since approved of by Sir *Joseph Jekyl* and Lord *Talbot*, in their judgments on the case of *Letchmere* and Lord *Carlisle*; the former of whom said, he

* observed it was admitted there, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband and wife, the money must have been taken as land: Now, such clause made no matter of difference; for, upon a convenient purchase being proposed, the court of Chancery would have taken upon itself to have judged thereof, and without some reasonable objection made, would have ordered the money to have been laid out in it: So that such clause seemed to have been immaterial in the marriage articles, and the opinion of *Hutchins* to have been well-founded.

Lord *Thurlow* also, in delivering his judgment in the case of *Pultney* and Lord *Darlington*, said, that he thought *Hutchins* was right in the case of *Simons* and *Rutter*.

So, where C. covenanted, on his marriage, to lay out 2000*l.* (then in the hands of trustees) in the purchase of lands, to be settled on himself and his heirs; 650*l.* part thereof being, at the time of his death, in the hands of the trustees, it was insisted in a cause in Chancery respecting this fund, that this 650*l.* ought not to

Note this was previous to the case of *Colwal* and *Shadwell*. 1 P. Will. 471. Since which it has been held, that tenant in tail remainder in fee to another, as he cannot bar by fine at law, neither can he be entitled to money so settled in equity. Besides, these articles would have required a strict settlement, in which the husband would have been only tenant for life. Vide 3 P. Will.

[* 98.]

Chaplin v. Horner, 3 P. Will. 483. Mich. 1718. S. L. Scudamore v. Scudamore, supra.

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[* 99.] be laid out in lands, but ought * to be looked upon as personal estate, and the widow to be entitled to a third part of it. The ground for which was, that C. being to be tenant in fee of the land when purchased, and having an absolute power over it by will, or otherwise, and it being then actually but money, it should be esteemed in no other light than as money. *Sed, per curiam*, it ought to be taken as land, and to go to the daughter as heir; the dispute in this case not being between C. and the trustee, but between the heir and the executor, who became entitled to the money subject to the covenant. And it was decreed accordingly.

Edwards v. Lady Warwick, 2 P. Will. 171. Trin. 1723.

Again, where A. on his marriage with B. who had a portion of 16,000*l.*—10,000*l.* whereof was agreed to be laid out in the purchase of lands of inheritance, to be settled on the issue of the marriage, with remainder to A. in fee. A. died leaving issue one son, who afterwards died. The money not having been invested, but being out on mortgage, the heir general of A. filed a bill to have it assigned to her. This was opposed by A.'s mother and administrator on the ground, that being then in itself money, it ought, by the statute of Distributions, to be divided between her and

[* 100.] * A.'s sister. But it was decreed to belong to the heir; which decree was afterwards affirmed in the house of Lords.

No difference has ever been made as to the consequences that flow from considering money as land, whether it be circumstanced in the one or the other of the before-mentioned predicaments; for the rule of equity will be precisely the same, whether the money be deposited in the hands of a third person to be laid out, or be resting in the hands of the covenantors, or in the hands of a person into whose possession it comes as land.

3 P. Will. 228.

Letchmere v. Lord Carlisle, 3 P. Will. 224 Ca. T. Talbot 91, 92. Mich. 1733. Easter 1735.

It was objected, indeed, in the case of *Letchmere* and Lord *Carlisle*, where Lord *Letchmere* had covenanted for himself and his heirs, to lay out 26,000*l.* in the purchase of lands, and to settle the same on himself and his wife, remainder to first and other sons &c. remainder to his own right heirs, on an application by the heir general for a specific performance, that this case differed from all that had preceded it: For that the money was never deposited, but remained in Lord *Letchmere's* own hands; and that he only was the debtor,

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and consequently his heir: So that * the heir was the debtor as bound in the covenant, and yet claimed as a creditor under the covenant. And it was said to be inconsistent for the same person to be both debtor and creditor: Besides, that, as far as the heir had real assets, the assets were at home already, and could not be sued for. But it was held by Sir *Joseph Jekyl*, Master of the Rolls, and his decree affirmed as to this part of the case by Lord *Talbot*, that this would make no difference; an heir could no more be looked upon as a creditor against his ancestor, than he could be looked upon as a purchaser under him; he took with the several burdens that his ancestor laid upon him; and, as on the one hand Lord *Letchmere* bound himself by his covenant to lay out this sum of 30,000*l.* in land, he on the other hand acquired a right to an estate for life, and to a remainder in fee, which, by his death, were severed, and the remainder only descended upon his heir. Thus, if a man articted for a purchase and bound himself, his heirs, executors, and administrators, he might as well be called in that case both covenantor and covenantee, as in the present case; but the heir was nevertheless entitled to have the purchase completed, and might compel the executor to do it, because * their rights were different; and where a man's design appeared to be to turn his personal estate into land, that gave his heir an advantage which a court of equity would never take from him. None of the cases cited warranted this distinction that was endeavoured at, and in reason there was nothing to warrant it, the intent and agreement of the parties being the same in both cases, which, if effectual in one case, there could be no reason why it should not be so in another. The case therefore fell within the common known rule, that money, articted to be laid out in land, was to be looked upon as land. Lord *Letchmere* was bound at the time of his death to lay out the money in land, by which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by his death, the right which he had to the remainder descended upon his heir.

It is true, there was a case in Chancery in Lord *Somers's* time, on articles made on the marriage of A. with B. by which it was agreed, that B.'s father should pay 1500*l.* in part of her portion, which, together with a like sum to be advanced by A. within THREE

Chichester v.
Bickerkaff,
2 Vern. 295.
Trin. 1693.

* YEARS

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[* 103.] * YEARS after the marriage, was to be invested in lands, and settled on the issue of the marriage, remainder to A.'s right heirs. A. died, and then B. died, both *within a year* after the marriage, and without issue. A. had made a will and devised the residue of his personal estate, after debts paid to his sister, making his heir at law his executor. And, on a bill filed by the heir at law to have the 1500*l.* paid him, it being to be considered and looked upon in equity as land, and therefore belonging to him as heir at law to his brother, the court decreed, that the money, though *once* bound by the articles, yet, when the wife died without issue became free again, and was under the power and disposition of A. (as the land would likewise have been in case a purchase had been made pursuant to the articles) and therefore would have been assets to a creditor, and have gone to the executor or administrator of A. and the case was much stronger where there was a residuary legatee. And the bill was dismissed.

Vide contra, *Kettleby v. Atwood, Lancy v. Fairchild, Scudamore v. Scudamore*, all of which are cases where there was no trustee. *Supra.*

[* 104.] But, a remarkable circumstance in this case, and what distinguishes it from all others which have as yet occurred is, that the wife died within three years after the marriage, during * which period the purchase was to have been made; so that the time was not come within which the money was to be laid out, and till then it continued money; and both Lord *Talbot* and Sir *Joseph Jekyl*, in speaking of this case in that of *Letchmere* and Lord *Carlisle*, in which all the cases on this head were collected and discussed, agreed in opinion, that the judgment in this case could not be maintained in opposition to so many decrees the other way, unless upon the foundation of this distinction; or under an idea that the court, in that case, had some evidence to induce them to believe, that the husband looked upon the money as personal estate.

Sed v. Brown's Ch. Ca. 238; the doctrine of this case confirmed and approved by Lord *Thurlow*.

Vide *Holt v. Holt*, 3P. Will. 222, 223. 2 Vern. 322. It is necessary here to observe that, in these cases of final limitations under articles, it is immaterial whether the claimants under them be purchasers for a valuable consideration or not; the foundation of their title not being in respect of the articles, *as being parties within the meaning of them*, but as heirs (by descent) of lands, the remainder in fee in which were vested in their ancestors, and which in course of descent fell upon them.

And this rule of equity, as to money articleed to

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* to be turned into land, is recognized and admitted in courts of law; for which reason where money, by marriage agreement, is articed to be invested in land, that money is held, at law, not to be assets for payment of debts. [* 105.]

Thus, in debt upon obligation against B. as an executor and *plene administravit* pleaded, on a special verdict, the jury found a lease for years to trustees to raise 1000*l.* and articles of marriage, whereby a daughter was to have 1000*l.* to remain in trustees hands for a year, unless the husband purchased, &c. and, if he did purchase, then the father-in-law covenanted to pay the sum of 1000*l.* to the husband, his executors, administrators, and assigns, and to pay interest until the purchase. They find that the land was not purchased, that the husband died, and that the wife received 300*l.* due for interest after the death of the husband. And hereupon it was contended on behalf of the plaintiff, that this was assets; for, though the wife in equity was to have the benefit of the land, yet, at law, till the fund was changed, it was assets, as an obligation to the husband. The receipt of money, it was said, followed the security, the money coming in * lieu of the debt which was here due to the husband: But the court was clearly of a contrary opinion; for this was no assets, the original money not being, in law, due to the husband or wife; and the covenant on the articles did not alter the former trust, nor did it take notice how the interest should be paid; nor was there any contract to pay interest after the death of the husband, but it was the result of natural justice, that he, in whose hand the money was, should pay interest to him to whom it was due. And judgment was given for the defendant. [* 106.]

And in the case of *Whitwick and Jermin*, wherein money was by a marriage agreement to be laid out in land, the court of Chancery would not let that money, as personal assets, be liable to other debts. *Whitwick v. Jermin. Vern. 471. cited 2 Vern. 58.*

This principle, that money to be invested in land shall be considered as land, has been, in the application of it, pursued through all the variety of legal consequences which naturally flow from it. It has, therefore, been decided that there may be a tenancy by the curtesy of it.

Thus,

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[* 107.] * Thus, where one devised 300*l.* to her daughter to be laid out by her executrix in lands, to be settled to the only use of her and her children, &c. and the daughter married, had issue, and died, living her husband, and before the money was laid out in land; it was held, that, as, if it had been an immediate devise of land, the daughter would have been, by the words in the will, tenant in tail, and the husband, consequently, tenant by the curtesy; so, the money being to be considered as lands, the husband should have the interest or proceeds thereof for his life, as tenant by the curtesy.

Cunningham v. Moody, *supra*
et vide 1 P.
Will. 176.

So it was held by Lord *Hardwicke*, in the case of *Cunningham* and *Moody*, that, as the eldest daughter, by the first wife, would have been tenant in tail of the lands to be purchased with the 500*l.* there settled to be laid out in lands, she should have the same interest in the money: The consequence of which was, that the husband surviving was entitled to be tenant by the curtesy thereof.

Ibid.

[* 108.] And, in the same case, it was questioned, whether the sister of the half blood would be entitled to the reversion in fee of the money * after the death of tenant by the curtesy, not as claiming from her sister; for in that right she could not have it, because, being but of half blood to her, she could not be her heir; but, as claiming it from her father by descent, who by the same settlement took an estate for life in the money, with a remainder in fee to him, his heirs and assigns for ever, which, according to the ordinary rules, vested in him, and, then, whoever took afterwards must take through him: Because a person, claiming by descent after an estate tail, must make himself heir to the first purchaser if it were a remainder, or to the donor if a reversion, and not an intermediate person to whom it descended, notwithstanding that person might have done what he would with it, as the sister, being tenant in tail, might have done here. And it was held by Lord *Hardwicke*, that the reversion in fee, so vested in the father, descended to the sister of the half blood; for, when not clothed with possession, it followed the rule of *possessio fratris*, although it was not exactly the same case. And his lordship said, the case of *Kellow* and *Rowden* came up to this; for it was there held to be sufficient for a claimant, in such case, to make himself heir to the person in whom the reversion first vested, without mentioning the intermediate persons

3 Mod. Ca.
226.

sons who never had the actual possession of the fee, but barely the reversion, although they might have charged, conveyed, or aliened it; And it was decreed, that the daughter of the half blood was entitled to the money after the death of the tenant by the curtesy.

And money, so predicamented, will pass in a will, under general words, as part of the testator's real estate.

Thus, where money in trustees hands was bound by articles, whereby it was agreed to be turned into land, and settled on the issue of a marriage, remainder to the right heirs of the husband; and he, there being no issue, devised certain lands to his wife, and the rest of his real estate in the county and city of York and elsewhere in Great Britain to another person, and gave his personal estate, and all his securities for monies to his wife, whom he made executrix: It was resolved, that the articles having in equity changed the nature of the money, and turned it as it were into land, it should be considered as real estate, and pass under the description of lands elsewhere in England, and not as part of the personal estate.

* So, where the remainder-man in fee of 6800*l.* [* 110.] vested in trustees, and bound by marriage articles to be laid out in the purchase of lands in Great Britain, or of some church, college, or other renewable lease, by his will devised all his freehold, leasehold, and copyhold lands lying in Islington, Elsfeld in Hampshire, or elsewhere to A. and, after her death to B. and his heirs; and, as to his personal estate of what nature and kind soever, he gave the same to C. paying his debts and legacies, and made C. executor. C. insisted, that the 6800*l.* ought to be taken as part of the testator's personal estate, and as such pass to him as part of the residuum thus bequeathed by the testator's will. *Sed per curiam*, the articles say it shall be laid out in the purchase of lands of inheritance, or in church and leasehold estates. Then the court must take it to be the one or the other of these, and, during the life of the husband and wife, if laid out, it must have been in one or the other of them. No sort of election was made by the husband. Then, at the time of the will and of his death, it stood in equity as it did in the articles, either to be laid out in freehold or leasehold, and, therefore the court would call it the one or the other of those

Vide Lingen v. Sowray, 1 P. Will. 172.
Mich. 1711.
S. C. 1 Eq. Ca. Abr. 175, Pre. Ch. 400.

Guidot v. Guidot, 3 Atk. 254, Trin. 1745.

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[* 111.] * those estates, according to the rule in equity, that what is agreed to be done must be considered as done. If it had not been for the *locality*, viz. estates in *Middlesex* and *Hampshire*, no doubt could have arisen; but there follows, "*or elsewhere*," which is the most comprehensive word he could have used. It had been said, that the lands did not lye any where, for they were not yet purchased; when people made such descriptions as the testator had done here, they intended to pass every thing they had in the world. Now the money was somewhere. It was, by the transmutation of the court, changed into land. Money was in *England* like *bona rotabilia* in the ecclesiastical court, which must be either in the diocese of the bishop where the person dies, or, in the diocese of the metropolitan, if he was possessed of monies in different places. So here, it was either in money or on a mortgage, and, therefore, the word "*elsewhere*" certainly took it in. Then the testator must have considered it as laid out in either one or the other. If there had been only a general devise of his lands, this money would certainly have passed.

Brown's Chan.
Rep. 236.

[* 112.] But, although money so circumstanced be as land to many purposes, yet, it is not strictly so * within the statute of wills; for it will pass by a will unattested by witnesses. The reason of this seems to be, that, when the owner gives it by a will not attested pursuant to the statute, without any thing further said, he thereby shews his intention that it should be considered as money, and not as land; in either of which lights it may be viewed by him, if it be absolutely vested in him.

Sed quære, if
expressly de-
vised and limit-
ed as land.

Contra of te-
nant in tail,
vide supra.

Edward v.
Countess of
Warwick, 2 P.
Will. 175.

* Ferrers v.
Ferrers, 1 Ch.
Rep. 17. 1629.

And although, *prima facie*, such money is, in equity, considered as land, and that idea is there followed up in all its consequences, so as to give it all the properties and qualities of a real estate, yet, a *tenant in fee* thereof may have it retained as money at his election; because, being absolute owner thereof, he might, if it were actually made land, turn it into money again immediately by sale; and a court of equity will not do so useless an act as that of compelling the owner to invest it in land, when he has the power of turning it the next instant into money again. But in order to make this equitable fund to be considered as money again, the owner must do something to shew that he has made that election.

^a Thus, where a remainder-man in fee of 4000*l.* in the

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* the hands of his father-in-law, being his wife's portion, and which was agreed to be laid out in lands (accounting the 4000*l* and interest, as part of his personal estate, she being dead, and no issue living) declared, that it should go to his executors to pay his debts and legacies, and died, leaving F. his executor: It was determined by the court of Chancery and judges, that, as if the land had been purchased, yet, the wife being dead, and there being no issue living, the husband might have conveyed away the same from the heir at law, notwithstanding the agreement; so 4000*l*. being to be paid by the bond to the son, his executors, or administrators, the same in law and equity belonged to his executors. And the money was decreed to the defendant, as the law had appointed, with interest.

[* 113.]

*Croft v. Ad-
denbroke, Hill.
1719. Fulham
v. Jones, Mich.
1720, both de-
termined by
Lord Parker,
vide 3 P. Will.
221, note C.*

So, if the testator devise it under the description of *so much money* agreed to be laid out in land; this will be sufficient to make it pass as personal estate, and by a will not attested by three witnesses.

And, it being merely a matter of election in the remainder-man in fee, in what light such a fund shall be considered, the only * object of enquiry is, what was his intent, which, being a matter of fact, lies in parol proof, and may be deduced from any act of the party, entitled to make the election, tending to evince his intent either way.

3 Atk. 256.

[* 114.]

Thus, in the before-mentioned case of *Lingen* and *Souray*, it was held that, (the remainder-man in fee having called in a part of the money laid out upon securities, and agreed to be invested in lands to be settled on the issue of the marriage, remainder to himself in fee, and put the same out upon *other securities* mentioned to be in trust for himself, *his executors, and administrators*; so much of the original sum as was subsisting on the securities upon which it was originally placed, or, on any other securities, where no new trusts had been declared, ought to be considered as real estate. But, as to so much of it as had been called in by the remainder-man in fee, and afterwards placed out on securities on a different trust, that should be taken to be personal estate; for, there being no issue of the marriage, it was in the power of the husband to alter and dispose of it as against the heir at law, though not against his wife; and the placing it out upon different trusts was

*Lingen v. Souray, 1 P. Will.
172, 176.*

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[* 115.] * an alteration of the nature of it, since the testator's declaring the trust *to his executors*, seemed tantamount to his having declared, that it should not go to his heir.

Chaplin v. Horner, 1 P. Will. 483. Mich. 1718.

So, in the before-mentioned case of *Chaplin* and *Horner*, where the tenant in fee of the 2000*l.* there covenanted to be settled, having *then* a daughter, had received 1350*l.* part thereof, and laid it out on a purchase for his life. On a bill, brought by the daughter after his death as heir to her father, to have the covenant in the marriage settlement performed in specie, it was insisted, on the part of the personal representative, and held by the Master of the Rolls, that the payment of the 1350*l.* to the father, who would have had an absolute power over the land, if purchased and settled, was a good payment; and that the money ought not to be refunded by his administrator, in order to be invested in land for the benefit of daughter and heir.

Bowes v. Lord Shrewsbury, 5 Bro. Ca. Par. 269.

*And, where 12,000*l.* was articulated on a marriage to be laid out in land, and, subsequent to the articles, the statute of the 11th and 12th of *William* the Third,

[* 116.] gion from * purchasing lands was passed (it being admitted in the cause, that, at the time of the articles being entered into, the parties were *Roman Catholics*, and so continued to the time of their decease) the lords commissioners of the great seal, on a cause before them, were of opinion, that the 12,000*l.* ought to be considered as money and not as land, and decreed accordingly; and this decree was affirmed on appeal to the house of Lords: One ground of which decision was, that it was not necessary to shew any express declaration of the party to the agreement, to whom the remainder in fee of the land to be purchased was limited, that the 12,000*l.* should be considered as money and not as land, the legislature having in effect enacted, that it should so remain and be considered, and should not be invested in, or considered as land. But if it had been necessary to shew any such consent or intention in the remainder-man in fee, in the eye of the law, his consent, as well as that of all other subjects, was supposed and considered as given to every act of parliament; and, therefore, he, by passing this act, consented in the most binding manner, that the 12,000*l.* should not be laid out in land, but should remain in money.

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* The remainder-man in fee, entitled to a fund so [* 117.] circumstanced, may make his election, as well whilst the preceding particular estates are in *esse*, as afterwards, to have it considered as money or land. Accordingly it was held, in the case of *Lingen and Sowray*, that the husband's taking fresh securities as to a part of the monies, which securities were mentioned to be to trusts different from those in the articles, shewed his election to alter the nature of the fund, and was valid for that purpose as against the heir at law, *though not against his wife*. Ac-Supra.

And, in these cases, even a parol declaration or direction from the remainder-man in fee will be regarded; for these cases do not fall within the purview of the statute of Frauds with relation to declarations of trust: Because the trust of the money is declared by the articles, the declaration is only in which shape the owner of the trust fund considers it. *Prima facie*, equity presumes it land; but that equity may be rebutted, by a parol declaration of the owner that he considers it money. He may elect, being absolute owner, which it shall be, it being privileged in equity to be taken as land or money at his option. Per Lord Maclesfield, 2 P. Will. 174.

* And very slight circumstances are sufficient to shew an intention in the owner to have such a fund considered as a personal estate. As if a man entitled to money so circumstanced, and having the same in his own hands, but on securities in other names, transfers them into his own; for his so doing furnishes a strong ground to presume, that he means to take possession of those securities in the shape in which they are at the time of the transfer; and, in this respect, the case of securities so credited in the hands of a man's self, is distinguishable from the case of such securities in the hands of trustees; for, in the latter case, a transfer from one trustee to another, without an alteration of the uses, it is apprehended, would not furnish a ground to presume an intent to consider the fund other than as it exists in equity, namely, as land. [* 118.]

The case of *Pultney and the Earl of Darlington*, was decided on this ground. In that case 23,488/ of Darlington, was bound by will to be laid out in the purchase of land, to be settled on W. P. the elder, for life, remainder to his first and other sons in tail male, remainder to H. P. for life, remainder to his first and other sons Pultney v. Earl of Darlington, Bro. Ch. Rep. 223.
in

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- [* 119.] * in tail, remainder to D. P. in like manner, remainder to W. P. the elder, father of W. P. in fee. D. P. died without issue male. W. P. the elder, changed all the securities in which the money was invested into his own name, and afterwards by his will, without taking notice thereof, gave his lands and his personal estate to H. P. in fee, and also died without issue male. Whereby H. P. became entitled to an estate tail, with a remainder in fee in this trust money. H. P. afterwards made his will, and, after disposing of some particular estates in *Middlesex*, gave all his other estates in *Middlesex*, and his estates in *Somerset*, *Montgomery*, *Salop*, and *York* (except the reversion of Lord B.'s estates) subject to a trust term to F. P. his heir at law for life, remainder to her first and other sons, &c. and gave all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, in trust, after payment of his debts, to lay out the rest in the purchase of lands, to be settled as therein mentioned, the ultimate remainder in fee to F. P. and, upon his death-bed, gave F. P. his heir at law, 2000*l.* in bank bills. On a bill filed by F. P. as heir at law to H. P. to have his trust money laid out in land and conveyed to her in fee, the
- [* 120.] * cause was heard before Lord Chancellor *Bathurst*, Lord Chief Justice *De Grey*, and Mr. Baron *Eyre*, who dismissed the bill, and, on re-hearing before Lord *Thurlow*, that decree was affirmed.

The principal argument in behalf of F. P. was, that H. P. had died intestate as to this property, and that, not having been in his contemplation, it must descend upon her as heir at law. But it was contended on the other side, and held by the court: First, That circumstances of demeanor in the person entitled to the remainder in fee, though slight, were sufficient, in cases like this, to decide the fund to be money again and not land. Receiving it from trustees would undoubtedly be sufficient. Then H. P. did receive this money, and had it in his hands. Secondly, That H. P. certainly did not mean to die intestate as to any thing. Then he had disposed of that part of his fortune that was actually land by local description, that part *then* that was not actually land, must have been meant to be compromised as personal estate. Thirdly, What rendered this more certain was, the circumstance of his giving F. P. 2000*l.* as it was improbable
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he could have any idea at * that time that she would [* 121.] become immediately entitled to 23,000*l.*; for he could not think that, in that case, she would want an immediate supply.

But it is observable, upon comparing the circum-^{Supra.}stances of the preceding case with those that occurred in the cases of *Lingen* and *Sowray*, and *Guidot* and *Guidot*, and applying the principle that governed those cases to the case last-mentioned, that the circumstances of the funds having been taken in, and of the gift of 2000*l.* to the heir at law, were extremely material; for, otherwise, it might have been contended with some confidence of success, that, as the trust money was invested in securities in *Middlesex*, and as H. P. clearly meant *not* to die intestate as to any part of his property, the trust fund ought to pass as land in *Middlesex*, and not as personal property; for, in the cases of *Lingen* and *Sowray*, and *Guidot* and *Guidot*, it was held in similar circumstances, that such a fund would pass,* by a devise, under the general description of "*lands elsewhere*," coming after particular lands described locally. Now, it seems a necessary consequence of the principle which supports that conclusion as to "*lands elsewhere*," after a * local description of [* 122.] particular lands, that, under a local description which embraces the local situation of the money, it shall pass as land there locally situated. So that either the doctrine of these cases, founded upon the maxim of equity, approved and sanctioned ever since that branch of our law has been formed into a system, "*that money to be laid out in land shall be considered as land*," and consequently treated as such in all relative situations, must be subverted and rejected, as decided against law; or money thus predicamented must be still considered as land, whether it be actually in the hands of the remainder-man in fee thereof (if he acquire it without any act done by him merely in its legal course of descent) or of a trustee, until some declarations made or act done from whence a contrary intent may be presumed to be entertained by the owner, who has a right to give to it either the one or the other character.

And if all parties, entitled to the beneficial interest in money directed to be invested in land, agree to take it as money, a court of equity will permit them to take it in its then state.

Thus

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[* 123.]
Badger v. Badger, Mosely
117.

* Thus where the husband, by articles previous to his marriage, covenanted to purchase lands of 80*l.* a year value, in trust for the issue of that marriage, as tenants in tail in common, remainder in fee to his own right heirs; and on a bill filed for that purpose, a decree was made, that the husband should perform the articles; the husband died, and the younger children joined in a petition with the eldest son, to have the money paid to them and not invested in a purchase, and an order was made accordingly.

Oldham v. Hughes,
2 Atk. 452.

But where there was a proviso in a subsequent agreement relative to money entitled in equity to the character of land, upon this contingency, that, if the tenant for life thereof died before the money was invested in land, *then* it should be divided and go among the several claimants thereof, their executors and administrators; it was held by Lord *Hardwicke*, on a question respecting it which arose before that event, that, as that contingency had not happened, and the tenant for life was then living, the original trust was still subsisting for the money to be considered as *realized*.

[* 124.]
Oldham v. Hughes,
2 Atk. 452.
Cunningham v. Moody,
1 Vez. 176.
Et vide Peacock and March, 1 Vez. 190.

* If the person entitled to the remainder in fee of a fund so circumstanced, be under any incapacity of affecting his real estate, he cannot, by any act, alter the nature of such money *realized*. Therefore, if it belong to a feme covert, being considered as a real estate, she cannot alter the nature of it barely by a contract or deed; for, if it were actually land, to alter the course of descent a fine must be levied, a feme covert being under disability to pass her real estates by any other assurance.

So, if the owner be an infant, no change can be effected as to the character of such fund, by any act or declaration done or made before he comes of age.

Seeley v. Jago,
1 P. Will. 389.

Thus, where one devised that 1000*l.* should be laid out in a purchase of lands in fee, to be settled upon A. B. and C. and their heirs, *equally to be divided*. A. died leaving the infant heir, and B. and C. together with the infant heir, brought a bill for this 1000*l.* Et, *per curiam*, as to the share of the infant, that must be brought before the master and put out for the benefit of the infant, who, by reason of his infancy, is incapable of making an election.

But,

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* But, in the case of a feme covert, the money [* 125.] may be got at without laying it out in land, by her coming into the court of Chancery and consenting to take it as personal estate: Because, upon her being present in court and examined, as a feme covert is upon a fine, as to such consent, the money articulated to be laid out in land will be bound, in equity, as much as the land would be by a fine at law; and she may thereby dispose of it to her husband, or any body else.

Oldham v. Hughes, 2 Atk. 452. Et vide 1 Vez. 176.

A devise of an equivalent interest of the same nature as is contracted by an agreement, or articulated, to be given or settled, may, in some cases, be taken as a performance thereof. But as every devise, *prima facie*, imports a bounty, it is incumbent on the parties, claiming to be discharged by a devise from the articles or agreement, to shew that it was such testator's intention, when he made his will, thereby to perform the articles or agreement on his part; and such intention must appear either from the express words of the will, or the clear and manifest intention of the testator evident upon the face of it, or be extracted out of it by necessary implication. Therefore, in order to make a devise, or bequest a performance * of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must, at least, be of such certain and known value or estimation, and so far of the same nature as the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value, but in annual income to the thing to be performed. The following cases will illustrate these propositions.

[* 126.]

If lands, of precisely the value covenanted on marriage articles to be purchased by the husband, be by him suffered to descend in fee, they will be considered to be intended as a performance of the covenant.

Thus, where W. upon his marriage, covenanted to purchase lands of the value of 200*l. per annum*, and to settle them upon himself for life, remainder to his wife for her jointure, remainder to the issue of the marriage in tail. And W. (who was a freeman of London) died intestate, having purchased lands of 200*l. per annum*, but not having made a settlement thereof, permitted them to descend upon his eldest son; this was held to be a performance of the covenant, for the

Wilcox v. Wilcox, 2 Vern. 558. Moseley 167, 168. Et vide Blandy v. Widmore, 2 Vern. 709. Abr. 341. Et vide Mascall v. Mascall, 1 Vez. 323. where the covenantor devised an interest

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[* 127.] value of the lands corresponding * exactly with that of those covenanted to be purchased, plainly shewed that the lands were bought with an intention to satisfy the covenant.

squaring with that he had agreed to give; and the devisee held to an election; not that one was a satisfaction for the other, but as a completion of the act, the agreement being a corroboration of the will.

* Vide Davys v. Howard, et ux, 5 Bro. Ca. Par. 552.

3 P. Will.
225. 1 Vez.
541.

[* 128.]
* Vide 1 Bro. Ca. Par. 351.

1 Vez. 226.
2 Vern. 298.
Vide Bro. Ca. Par. 551.

Letchmere v. Lord Carlisle,
3 P. Will.
225. Ca. T.
Talb. 80.

* So if money be subjected to a trust, and laid out upon securities; and tenant for life of it, under the limitations, call in a part thereof with the consent of the trustees, and re-invest it in his own name without the interposition of trustees, and then die, leaving real estates, of which he was absolute owner, to descend to his heir, who would have been entitled to the money or land purchased therewith as tenant in tail; such estates descended will be considered as a compensation for, or a performance of the trust, except as to so much of the money as still remains on the old security, and in the names of the trustees; for, the presumption of compensation or performance, will not reach that.

But where the lands, covenanted to be bought, are expressly stipulated to be lands of inheritance and in fee simple, the purchase of copyholds, leaseholds, estates for lives, or reversions expectant on estates for lives, will not be considered as a part performance of such a covenant; ^b Because copyholds are subject to a different kind of tenure, and terms are not descendable to the heir, nor can an immediate profit be had from reversions, especially if they do not fall within the covenantor's own life.

So money, though of much greater value than land agreed to be purchased, given to the claimant under an agreement, cannot be considered as coming in lieu of the land; because money and land being of a quite different nature, the gift of the one can never be taken as a performance of a prior contract to settle the other.

We have observed that, in cases of implied performance, the intention ought to govern, and that there must, in all instances of this kind, be some positive evidence, or at least, some circumstance, furnishing a strong and necessary presumption, that whatever is taken to be a performance, was clearly and manifestly intended as such by the person effecting it. Upon that ground it has been held, where one, bound by a covenant made on his marriage, to lay out 30,000*l.* in the purchase of lands, was seised of land in fee at that

time

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time of * the value of 300*l. per annum*, and afterwards died intestate without issue, and without having made a settlement of any estate; that the covenant did not relate to the lands which were the covenantor's at the time of entering into the articles, the words being future, *viz.* that he *would* purchase. And then, as the intention of the party did not plainly appear, that his estate, which he permitted to descend, and which did not amount to the value of what he articted to purchase, should be for or towards a performance, it should not be so considered: Besides, it was said that such inference would be to disinherit an heir by an implication not necessary, contrary to the known maxim of law. [* 129.]

Vide Took v. Hastings, infra.

But lands, purchased at different times, but subsequent to such articles entered into or covenant made, will be considered (although not purchased in trustees names, nor declared to be to the trusts of the covenant) as bound thereby; not in the light of a satisfaction, but, under the notion of being a part performance, founded upon a presumed intent of the covenantor, at the time of the purchase made, to purchase pursuant to the covenant he was bound by, and, consequently ought to * perform. w And, therefore, [* 130.] Lord Talbot, in the case of *Letchmere* and Lord Carlisle, held, that, as under the covenant then under consideration, there was no obligation on the covenantor, as to purchases of lands in fee simple in possession, to lay out the whole sum at one time; and, as there were lands in possession of inheritance purchased, which, though not purchased with the privity of the trustees, yet it was natural for the covenantor to suppose that the trustees would not dissent from those purchases, being entirely reasonable (the design of interposing trustees being not to prevent proper but improper purchases) and as, though these lands were not purchased within the time limited in the covenant, yet nobody suffered by it, and therefore that circumstance could not vary the intent of the party in a court of equity (which intent seemed to be, that, as soon as the whole money was laid out, the lands should be settled together, and not to make half a score settlements) it was reasonable to suppose, in the present case, that these purchases were intended to satisfy the covenant. And, as to these purchases, the decree of Sir Joseph Jekyl, that they were not made in performance

[* 130.]
Ca. T. Talb.
92, 93.

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[* 131.] ance of the covenant, and therefore could not be taken as such, so far as * concerned them, was varied by his lordship on the re-hearing.

Smith v. Deacon, cited 1 Vez. 540. in March 26, 1756.

The same principle of a presumed intent, (as to purchases made by the covenantor after an agreement to convey and settle houses, lands, &c.) to carry the agreement into execution, was recognized by Lord *Hardwicke*, in the case of *Smith and Deacon*, and governed the decision of the court in that case. And the point being re-agitated in the case of the Attorney General and *Whorwood* was given up, as decided in the two cases before-mentioned: And it was admitted by all parties to be then settled, that if a person, obliged under articles to purchase, did purchase, though not to the extent the articles required, such purchase should go to make good the articles, so far as it could be applied.

1 Vez. 540.

But, as the ground, upon which such after-purchased lands are considered as purchased in part performance of the agreement, is the presumed intention that the party purchased them with that view, in consequence of which the covenant or agreement attaches upon these estates as a lien on them in the hands of the purchaser and his heirs; that lien will not follow them into the hands of subsequent purchasers or mortgagees: Because, whether the covenant or agreement shall attach upon them depends upon the intention of the purchaser, and the presumption that a performance is by him intended stands only till the contrary is proved; therefore any act, shewing he had not a part performance in view, as a mortgage or sale afterwards, will take away the presumption.

[* 132.]

Tooke v. Hastings, 2 Vern. 97.

But it seems, that the presumed intent would be a lien upon the lands against a devisee; for the court said, in the case of *Tooke and Hastings*, that if a man covenanted or entered into a bond to settle land of such a value, or an annuity out of land of such a value, and had no land at the time of the settlement, but afterwards purchased land, that land should be liable against a voluntary devisee; and such devisee should be reimbursed out of lands left to descend to the heir, if there were any such.

And such after purchase, it seems, will not be liable to the debts of the purchaser.

Plowman v.

Thus where, on the son's marriage, the father settled

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settled a lease for two years (held of the * Queen Dowager) on the son for life, and then on the issue of that marriage; * the son covenanted to renew the lease from time to time, and to assign the renewed lease to trustees to keep the same on foot as long as the wife, or any child of the marriage should live; and the son renewed the lease in his own name, and made no assignment thereof to trustees, and died greatly indebted without assets: It was held *per curiam*, that the lease was bound by the marriage articles, and should not be assets, nor liable to debts.

[* 133.]
 Plowman, 2
 Vern. 289,
 • Sed note,
 the lease itself
 was specifically
 settled, and
 then the re-
 newal is only
 a continuation
 of it.

If one covenant to settle lands of a certain value on his heir, not specifying any lands in particular, and then die, and lands of greater value descend upon the heir, they shall be bound by the covenant.

Thus, where B. on the marriage of his son, covenanted for himself, *his executors and administrators*, to settle, ^a within one month after the marriage, lands of the value of 150*l. per annum* to the use of the husband, and first and other sons, and for raising portions

Roundell, et
 al, v. Breary,
 2 Vern. 482.

^a Not to purchase.

for daughters; but no lands in particular were mentioned in the articles. And B. afterwards died having never made any settlement, and his son thereupon entered upon the lands whereof his father * died seised as heir, and married a second wife, and settled part of these lands upon her and her issue. It was objected, on a bill filed to have 150*l. per annum* settled pursuant to the articles on the first marriage, that, no lands in particular being mentioned in the articles, there was no lien upon any particular lands; and that therefore the only remedy was against the assets of the covenantor, and even that must be confined to his personal assets and would not reach his real assets; because, the covenant was only for him, his executors and administrators, and not for him and his heirs; besides which it was urged, that the second wife was a purchaser without notice, and could not be affected by the articles: But the Lord Keeper was of opinion, that, although no lands were mentioned by the articles, yet, the covenant should be a lien upon the land whereof the father was, at the time of entering into it, seised, unless he had purchased or settled other lands within the time limited by the articles.

[* 134.]

But the ground of the preceding case seems rather to have been the presumed intent of the father, that the estate descending should be, to the extent of the covenant, a performance thereof, than that the covenant was a specific

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[* 135.] * specific lien ; and this observation seems warranted by the following case, the only distinction between which and the preceding case appears to be, that the devise in the following case removed the possibility of a presumption, that any part of the testator's estate, not specifically bound, was intended by the covenant, to go in performance of it. In the case I allude to there were several demands of several natures affecting the estate of a testator, he being indebted by bond and by simple contract, and having upon his marriage covenanted to settle specific lands, and also land that should be of the value of 60*l.* *per annum* upon his wife for her life : * His will charged all his estate, real and personal, with the payment of his debts. And it was held that, as to the specific lands, the covenant was a lien upon them ; but, as to the settling lands of the value of 60*l.* a year, it did not bind specifically any lands ; wherefore, as touching that, the wife must come in only as a specialty creditor ; and, in order to settle the *quantum* of the demand, the master must make an estimate of the value of the wife's estate for life, and she must come in as a creditor by specialty to that amount.

[* 136.] * A court of equity will decree the specific execution of an agreement, notwithstanding the insertion therein of a penalty in case of a non performance ; for, though it was anciently held, where there was a bond to perform any thing, that the obligor was obliged to the alternative either to perform the thing or pay the money, and, therefore, that the obligation was discharged by paying the penalty ; yet, it is not now taken as an agreement in the alternative, in which the obligor may either pay the money or perform, but the penalty is understood only as an enforcement of the agreement, and as giving a remedy at law for a certain sum, instead of uncertain damages : And the party by providing his remedy at law, does not take away his remedy in equity ; for it would be hard, that a man's enlarging his security at law should make him in a worse condition in equity than he could otherwise have been ; ¹ nor can it be inferred, that the parties, by adding a bond to enforce the performance, intended to weaken the lien they had under the agreement.

^m Thus, where articles were executed for performance of an agreement for purchase of an estate, with a provision that the purchase money should be paid by instalments, it cannot operate as a satisfaction, where the instalments are less than what is due by covenant, it cannot operate as a satisfaction, vide *Kerman v. Kerman*, Brown's Chan. Rep. 1786, fol. 95. ¹ Vide *Bagg v. Foster*, 1 Ch. Ca. 188. S. C. 3 Chan. Rep. 50. ^m *Howard v. Hopkins*, 2 Atk. 371. et vide *Hopson v. Trevor*, Strange 533. et 2 Eq. Ca. Abr.

Freemount v. Dedire, 1 P. Will. 429. * Note, the distinction between these cases of a presumed performance of covenants and agreements to convert money into land, &c. which do not stand upon the ground of satisfaction ; and covenants as to the precise value of lands settled in jointure or the like : For, as to them, a money legacy to a like or greater amount than the deficiency, will be

considered as a satisfaction, vide *Viscount Montague v. Sir George Maxwell*, 1 Bro. Parl. Ca. 553. Sed vide *Broughton v. Etrington*, *ibid.* vol. 7. fol. 12. et *Lee v. D'Aranda*, and *Bland v. Widmore*, cited 1 Vez. 521. et *Duffield v. Smith*, 2 Vern. 258. The distinction seems to be where the whole is satisfied, and where it is not. If a legacy, or what is inferred to descend under the statute of

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vise therein, that, if either * side should break the [* 137.]
 agreement, he should pay 100*l.* to the other. The 55. 3. S. C.
 vendor, meeting afterwards with a third person, who 2 P. Will. 192.
 offered him two years purchase more than the vendee, Nandike v.
 immediately accepted of it. And one ground of argu- Wilkes, 1 Eq.
 ment on behalf of the vendor against a specific perform- Ca. Abr. 393.
 ance was, that it was the intention of the parties, 5 Gilb. Rep.
 that, upon payment of 100*l.* by either of them, the Eq. 113.
 agreement should be void. *Sed per curiam.* As to
 the defence on the foundation of the sum stipulated,
 the court cannot consider that as a ground to let off
 either party when they please; it being no more than
 the common case of a penalty, which might be inserted
 by the vendee in order to be paid for his trouble of
 viewing and measuring the estate, taking plans, &c.
 supposing the defendant should not be able to make
 out a title.

But still, this depends upon the nature of the agree-
 ment; for where the object of the agreement is da-
 mages only, there the penalty shall be the criterion
 of the injury.

Thus, were D. executor of C. employed as a master Davis v. Cortis.
 of a ship by the *East India* Company, covenanted with 1 Ch. Ca. 226.
 them, that he should * pay a certain mullet for every cloth [* 138.]
 carried &c. in the ship; and C. took D. as his mate,
 who made an agreement *mutatis mutandis* with D. and
 gave a bond in the penalty of 50*l.* for due performance
 on his part; and E. without D.'s knowledge, carried
 so many clothes as the mullet thereof came to 70*l.* which
 the company deducted out of the master's wages: It
 was held, on demurrer to a bill filed against the mate
 for relief, that the executrix of the master could not
 have relief against the mate beyond the 50*l.* secured by
 the bond.

If new matter come out respecting an agreement,
 against which a decree has before been made in a cause
 between other parties, the court will, notwithstanding,
 support the agreement, although it has before decreed
 otherwise: For the person, not party to the original
 suit, is not bound thereby, and then, without any
 regard to a former decree, the court will judge upon
 the case before them.

Thus, where a lessee of a house assigned his term to Natchbolt v.
 B. who covenanted, in the assignment, to indemnify Porter,
 the assignor against the covenants in the original lease; 2 Vern. 112.
 C. bought

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- [* 139.] C. bought * the reversionary interest of the lessor, and then treated with B. for a surrender of the term; and an assignment was made between them, and the key delivered and accepted: But, afterwards, C. altering his intention of living in the house, it stood empty for some years, and then C. brought a bill against A. the original lessee to compel him to admit an attornment, in order to his bringing his actions at law for the rent; but B. was made no party to that suit. A. in his defence, insisted upon the agreement between B. and C. for the surrendering of the lease, and upon the delivery of the key pursuant thereto. But he was overruled in this at the hearing, and it was decreed, that he should go to a trial at law, and admit an attornment; but A.'s attorney pleading that he never attorned, upon the cause coming back into Chancery, it was decreed that A. should pay the rent arrear. Then A. being dead, his executor filed a bill to be reimbursed against B. according to his covenant upon the assignment, upon which he could not recover at law, by reason that C. could not, at law, have recovered of A. for want of an attornment. B. by answer set forth the agreement made with C. for surrendering his term, the delivery of the key, and C.'s * acceptance of it, and therefore insisted, that he ought not to be charged. And upon the hearing of the cause, the court was of opinion that the agreement was well proved, and a good discharge, and that B. was not liable to answer any rent after that time; and the court said, that though the court had decreed otherwise against A. yet B. being no party to that suit was not bound thereby.
- [* 140.]

Vide Plunket
v. Lord Kings-
land, 4 Brown
Par. Ca. 567.

If any question of fact arises on a bill for specific execution of an agreement, a court of equity will direct an issue at law thereupon: As if it were contended, where an agreement for making a lease was by parol, that it was part of the agreement that a third person's consent or approbation should be had to make such lease valid, and whether (supposing the obtaining such consent or approbation was part of the agreement) it were given or not: Or, as to whether another party (stipulating after such conditional agreement as above-mentioned made) had notice of that conditional agreement; and the reason is, that, in such cases, whether the agreement was conditional, whether the condition was performed, whether there was any notice, or the like, are questions of fact which must be ascertained by

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* by a jury, before the court can decree as to the principal question. [* 141.]

If, on a bill for execution of articles, or of an agreement in specie, it appears that the one party, against whom the suit is preferred, insisted to have had clauses, usual in agreements of the nature of that on which the cause arises, inserted, and that the other party refused to insert them; the court will send the articles, if they relate to a purchase of land, to the master, to see if there are the usual covenants: Because the court, having a discretionary power, will not exercise it, unless the agreement be proper, and agreeable to the nature of the subject contracted about. But, if the contract be respecting a personal thing, it is different; because such things being to be had at one place as well as another, when the parties contracting for a purchase find that the parties, contracted with, will not insert the usual covenants, they have no occasion to wait the event of a Chancery suit, but may go to another market to supply themselves. As if the contract be for a purchase of timber growing, and the purchaser had insisted to have the usual clause inserted in the articles, relating to the buyer's horses being permitted to graze on the * land where the timber stands; and likewise for indemnifying him in falling the timber, (that is, if it grow in hedge rows, and one side belong to a stranger, because they will be liable to trespass, if it fall on the stranger's lands) and this be denied by the vendor; this will not be a ground to refer the cause to a master, the contract being personal, and the subject to be purchased elsewhere.

Burton v.
Lister, et al,
3 Atk. 383.

[* 142.]

As a beneficial bargain will be decreed in equity, so *Vide 2 Vern.* likewise will one that happens to be a losing bargain; for 398, 423. the same reasons and principles apply to both cases.

[* 143.] * Of the equitable Jurisdiction in relieving against unreasonable Contracts or Agreements.

UPON this head of enquiry it is observable, that a court of equity will much more easily be prevailed upon to dismiss a bill which has for its object the specific execution of an unreasonable agreement, than to set aside an agreement, though it be not strictly equitable, on a bill for that purpose; for the latter is to deprive the party, against whom it is preferred, of that to which, by law, he has a right: And if a court be prevailed upon to set aside such an agreement, it will be on refunding what has been *bona fide* paid, and making allowances for improvements, &c.

Vide infra.
Bosanquet v.
Dalhwood. Ca.
T. Talbot 38.

Subject to the foregoing general observation, I shall now consider the principles on which courts of equity have exercised this branch of their jurisdiction.

[* 144.] * The better opinion seems to be, that the mere fact of a bargain being *unreasonable*, is not a ground to set it aside in equity, if the parties are of age, perfectly acquainted with their respective rights, each of them aware of what is done, free from any deception, and speak what they respectively mean: For, contracts are not to be set aside, because not such as the wisest people would make; but there must be fraud to make void acts of this solemn and deliberate nature, if entered into for a consideration.

Whitfield et
ux, v. Paytor,
et ux, Show.
Par. Ca. 20.
Vide infra,
Keene v.
Stukeley,
et Vide Squire
v. Baker, 5. Vin.
Abr. 549. P. C.
12. 2 Ed. Ca.
Abr. 58. Pl. 5.

Therefore where A. having an estate of 1000*l.* per annum, was a suitor to M. daughter of B. who was reputed very rich; B. upon proposal of a marriage made by A. agreed to give her 5000*l.* certain, but insisted on having a jointure of 5000*l.* so settled, that his daughter should have the inheritance thereof, if A. died without issue. These terms A. refused at first to assent to, but afterwards agreed to accept of. Thereupon a settlement of a jointure of 500*l.* a year was made, and a deed was likewise executed in the nature of a mortgage of all A.'s estate, for securing the payment of 5000*l.* to M. in case A. died without issue. A. died within a fortnight after the marriage

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*marriage without issue. Then M. preferred her bill to foreclose the equity of redemption. It was objected, on behalf of the heir at law of A. that he was a weak and sickly man; that the agreement was in its own nature unreasonable, it being that M. should have both portion and jointure, whereas one was the consideration of the other; and it was said, that both should be vested in the same person, the portion returned, and the jointure enjoyed, was very hard, and constituted an agreement that ought to be set aside. But, upon the hearing, a decree was made in favour of the agreement by the Master of the Rolls. And his decree was affirmed by the Lord Keeper on re-hearing on an appeal. [* 145.]

But, if there be any fraud in the transaction, then unreasonableness in the bargain, whether it be on the side of the vendor or vendee, will be a good ground, upon which a court of equity may be applied to, to set it aside. Vide infra, Clarkson v. Hanway, et al, 2 P. Will 203. Cole v. Gibbons, et al, 3 P. Will 290. infra.

And agreements that are not properly fraudulent, in that sense of the term which imports deceit, will, nevertheless, be relieved against on the ground of inequality, and imposed burden or hardship on one of the parties * to a contract; which is considered as a distinct head of equity, being looked upon as an offence against morality, and as unconscientious. Upon this principle, such courts will, in cases where contracts are unequal, as bearing hard upon one party (though perhaps in themselves, and abstractedly upon general principles, equal; because, as to outward actions, the inequality to which both parties to a contract have consented, where there has been no lying nor concealment of any thing that ought to be discovered, is an inequality that passes for equality) set them aside: As if a covenant be inserted in a mortgage that, if the interest be not paid punctually at the day, it shall, from that time, and so from time to time, be turned into principal, and bear interest. This covenant will be relieved against as fraudulent, because unjust and oppressive in an extreme degree. [* 146.]

And the rule of equity applies equally, although the mortgage be of an estate in reversion, and not in possession. For the mortgagee knows his security to be a reversion, and he may bring a bill of foreclosure, or, if there be a bond, he may put it in suit. Sir Thomas Meere's case, cited Ca. T. Talbot 41 et Mosely 247. Lord Ossington v. Lord Yarmouth, 2 Salk. 449.

Thus

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[* 147.]

Broadway v.
Morecraft,
Moseley 247.

* Thus where, in 1693, a reversion was mortgaged, and the mortgagor never paid the interest money; but in 1711, the mortgagor and the mortgagee came to an account of what was due for principal and interest, and a new mortgage was made for the whole, with a covenant that, at the end of every year, if the interest was not paid within three months after it became due, it should bear interest: It was held, by the Master of the Rolls, that this was a void covenant, and the mortgagor might redeem on the common terms.

Cole v.

Gilborne, &c.
3 P Will. 290.

Again, Where A. made his will, and thereby gave a legacy payable to M. (a young man of about twenty-four years of age, who had led an extravagant life, and had lain for some time in *Newgate*) if he should survive C. the testator's wife, who was about sixty-four years old, and was to have it in case she should survive M. Afterwards D. entered into an agreement with M. for the purchase of this contingent legacy, and contracted to give him 100*l.* for it, to be paid by 5*l.* *per annum*, at every *Christmas*; with a proviso, that if M. should survive C. then what should remain due of the 100*l.* should be paid within a year after her death; but if M. should die in the life-time of C. then the 5*l.* *per annum* to continue until the 100*l.* should be

[* 148.]

paid to the executors, administrators or assigns of M. Lord Talbot, on a bill filed by D. on the death of C. again M. to have the 500*l.* paid him, said, that, had the case turned upon M.'s assignment, he would have set it aside; not on the ground of its being a bargain with a young heir, which stood upon a different principle, nor on the ground of fraud or surprise, for nothing of that kind appeared; but merely *as being an unreasonable advantage made of a necessitous man.*

This being the rule of equity *even* in transactions which, strictly speaking, may be construed as lawful; the principle applies still more strongly where the covenant or agreement is against an express law: As, if it be against the statute of usury.

Bosanquett v.
Dashwood, Ca.
Temp. Talb.
38.

Thus where A. in 1710, lent to B. and C. traders, several sums upon bond, bearing 6*l.* *per cent.* interest, which was then lawful usage; but A. taking advantage of their necessitous circumstances, compelled them to pay at the rate of 10*l.* *per cent.*: They submitted to this imposition, entered into other agree-
ments

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ments for * securing the same, and continued paying [* 149.]
10l. per cent. from the year 1710 to the year 1724. Then B. and C. became bankrupts, A. died, and the assignees sued A.'s executors upon this transaction: It was decreed, at the Rolls, that the executors should account, and that legal interest should be computed and allowed for what had really been lent, and that what had been paid over and above legal interest, should be deducted out of the principal, and that the assignees should pay what should be due on the account. And this decree was, on appeal, affirmed by the chancellor.

An agreement, infected with fraud *upon the face of it*, will be void in law, as well as in equity.

The above-mentioned case of *Willis and Baldwin*, Willis v. Baldwin, Doug. Rep. 450. Supra. in which an agreement between two sutlers of militia, and the contractor for forage by the ration, that the latter might restrain the rations paying and allowing the sutlers nine-pence half-penny by the ration for every ration left, was held insufficient to support an assumpsit as founded an fraud, is in instance of this sort.

In cases of fraud, or imposed hardship on one * party by another, it is no answer to the relief prayed, [* 150.] to say, "that the party applying was *particeps criminis*;" for it cannot be said, in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship that he is *obliged* to submit to (it being imposed on him by another, and not voluntarily acceded to) that constitutes the crime. Therefore a compliance with terms imposed that are illegal, as the payment of money with usurious interest thereupon, will not alter the relief in a court of equity; for the money ought not to have been paid. Consequently the maxim, that "*volenti non fit injuria*," does not hold in any cases of fraudulent or hard bargains imposed upon one party, against which equity relieves. It is only the corrupt conscience of the persons which imposed such bargains that is to be considered; that corruption alone entitles the party oppressed thereby to relief.

But where both parties are criminal *in equal degree*, Ibid. 47. there the maxim of "*volenti non fit injuria*" applies: As in the case of gamblers; for, if two persons will sit down and endeavour to ruin one another, and one pays the money won, if, after payment, he cannot re-
cover

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[* 151.] cover it * at law, a court of equity has nothing to do but to stand neuter : there being in that case no oppression on the one party, as there is in the instance before-mentioned.

Ibid. et vide
Burney v. Pitt,
3 P. Will. 294.
in note.

If such inequitable advantage be taken of a man's necessities, and the securities procured from him be outstanding, so that the party holding them is to be redeemed; a court of equity will decree, that, if the party holding them has received more than was due with legal interest, the surplus shall be refunded, and the securities delivered up; which is agreeable to the common direction in all cases where securities are sought to be redeemed; namely, "that if the party has been overpaid, he shall refund." Thus it was decreed, in the before-mentioned case of *Bolanquet* and *Dashwood*, that, if the testator had received more than was due with legal interest, his executors should refund it, and deliver up the bond. For the chancellor said, that the party should not keep money that he had no right to merely because he had got it into his hands.

Vide supra. Ca.
T. Talbot 38.

[* 152.]
Ibid.

But if the transaction were at an end, and all * the securities were delivered up, the equity might possibly be otherwise.

1 Wils. 230,
231.
2 Vez. 518.
Brown's Rep.
Chan. Ann.
1787, fol. 175.
Et Griffith v.
Spratley, ibid.
179 in note, et
vide 1 Vez. 1155.
et Wood v.
Fenwick, Prec.
Chan. 206.
S. C. 1 Eq. Ca.
Abr. 170. 2.
Nicols v.
Gould, 2 Vez.
422.

Inadequacy of price, *abstracted from all other considerations*, seems of itself (upon revision of the best authorities) to furnish no ground on which a court of equity can set aside, or rather relieve a party to a contract; the law of *England* having never fixed any certain proportion, that the price should bear to the thing purchased.

But if the cause of the inequality of price be founded in circumstances, from whence a court of equity may conclude, that the consent of the party to accept such price either was not free, or was conditional; being had under an impression that circumstances were otherwise than they were represented to the party consenting to such unequal terms; such a case, if the party contracted with be acquainted and take advantage thereof, will furnish adequate grounds for a court to set aside a contract so circumstanced.

Under the first of the distinctions above alluded to,
viz

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viz. the one party not giving a * free consent; [* 153.] those contracts may be arranged, which are entered into under the impulse of distress in the one party known to the other party: And indeed, in such cases, the observation made on the operation of fear in one of the parties to a contract applies; namely, that, although the party may be said freely to elect the hard bargain offered in preference to his then state, and so to contract an obligation; yet, the other party, who takes advantage of his circumstances to force him to enter into such obligation, acts frequently, and, therefore, wants the power of creating in himself a *right*, and thus the obligation fails for want of a corresponding right.

Vide *infra* this doctrine further explained.

This was the true principle that governed the court in the case of *Herne v. Meers*; where A. and B. (father and son) being indebted to C. by bond, C. sued them thereupon, and was proceeding to outlawry, when they returned, and C. got possession of some part of their estate. Then B. who had divers estates, sold them to C. for less than half their value. Afterwards B. filed his bill for a discovery of all the estates of A. and B. and of what money was due to C. on the securities. C. insisted, that he was a purchaser for a valuable consideration. * At the hearing, the plaintiff's counsel relied upon the inadequacy of the price paid. And by the decree the lord chancellor declared, that the bargain made by C. with B. was not fairly obtained in respect to the circumstances B. was in, but ought in conscience to be made void, the premises purchased by him being more than double the value of the money paid by him.

Herne v. Meers, 1 Vern. 465. *Brown's Chan. Ca.* 176 in note.

[* 154.]

It is hardly necessary to observe, that the fact the chancellor rested upon was, "the bargain not being fairly obtained in respect of the circumstances B. was in," which let in an equity, whereon the bargain, being unfairly obtained, ought to be made void, being for less than half the value.

The principle established in the last-mentioned case, has, of late, being followed up by that profound lawyer, Lord *Kenyon* (when Master of the Rolls) in his decree in the case of *Heathcoate* against *Paignon*: which decree was afterwards, on appeal, affirmed by Lord *Thurlow*.

Heathcoate v. Paignon, Bro. Rep. Chan. vol. ii. 167. 1787, East. to Term.

The facts in the case were as follows: A lent to B. 100*l.* on bond. A short time afterwards A. agreed

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[* 155.] * to the purchase of B. (being then thirty years old, but occasionally afflicted with the gout) an annuity of 50*l.* for the life of B. (to be secured by a bond and judgment, together with an assignment of B.'s salary as a commissioner of the Tax Office) for the sum of 200*l.* The writings were accordingly executed, and the purchase money paid. The bond debt remained undischarged until after the Death of A. It was then paid, and, immediately thereupon, a bill was filed by B. against the representatives of A. to be permitted to redeem upon payment of the 200*l.* with interest at 5*l.* *per cent. per annum.* On the hearing it was referred to the master to enquire, what was the value of the annuity on the day on which it was purchased, and also what was the market price, all circumstances of the state of health of the grantee being considered. The master reported, that he had been informed that the annuity was worth ten years purchase; but that the market price was about six. Whereupon his honour declared, that he was of opinion the purchaser, taking advantage of the seller's distress, purchased the same under the market price, and that, therefore, such purchase ought to be set aside.

[* 156.] * The circumstances, which furnished evidence of the seller having been distressed, and that his distress was taken advantage of in this case, seems to have been the buyer's having been acquainted with the seller's want of money; and his having enthralled him (the seller) by suffering him to contract a debt upon bond, by which means the buyer had him so far within his power, as that he might have distressed him on his non-compliance with his own terms, by suing him on his bond.

It is observable, on this case, that the *quantum* of the inadequacy is immaterial; if the cause that produces it arises from undue advantage taken of the circumstances of the seller.

The other instance, wherein inadequacy of price will be a ground to set aside a contract, is, where it is caused by the seller having been led by the buyer to conceive the existence of something, that lessens the value of his property, for which there is no sufficient grounds; for, in such cases, the cause why the seller contracts at an inadequate price, is the apprehension, that his property is in a different state from what is really

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really the case. The consent to * accept such terms, [* 157.] therefore, ought to be considered as given upon condition that the circumstances are as stated; and if they be not so, and *that* to the knowledge of the party contracting, the bargain is fraudulent on his side, and such from whence he can derive no right; consequently such as cannot induce any obligation in the other party.

This principle may be extracted from the case of *Baldwin v. Baldwin and Rochford*, where the purchaser of some shares of a prize which was insured, knowing that the sellers had been refused any advance thereon by their captain, and threatened by him with being pricked as ran away from the ship, in which case they would have forfeited their shares, took advantage of these circumstances; representing to them the danger they were in of losing their shares, either in case they were pricked by the captain as ran away, or if the prize should happen to be retaken, at the same time telling them that the adverse fleet was out; under which circumstances he bought the sailor's interest for one-fourth of their value. Upon which grounds, principally, the court of Chancery set aside the contract.

And although inadequacy of price, * considered abstractedly *qua* such, is not a ground to invalidate a contract; yet, there is a great opinion (and which I trust will not be suffered to lye dormant, when occasion offers to give effect to it) that, taken in another light, and not merely in the view that the price is inadequate, the circumstance of inadequacy alone can be made a ground for setting aside a contract. I mean, in the light of furnishing *self-evident* demonstration, from the intrinsic nature and subject of the bargain itself, of *fraud*; evincing that the party who suffers the loss must have been imposed upon, and cannot be considered as having been in possession of an understanding adequate to render him capable of contracting; in which case no obligation could be incurred by him. [* 158.]

Thus, Lord *Thurlow* observes, upon the case of *Heathcoate and Paignon*, that, where there is such inadequacy as to evince, that the person did not understand the bargain he made, or must have been so oppressed as to be glad to make it, knowing its inadequacy, it will shew a command over him, that will amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other,

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[* 159.] it puts the parties in a situation, that shews it could not have taken place * without superior powers of the one side over the other.

And, even at common law, contracts, from which it is, *prima facie*, self-evident, that one of the parties must have been entrapped, will not support an action.

Vide James v. Morgan,
1 Lev. 111. as
alluded by Lord
Hardwicke,
2 Vez. 155.

Thus, where one agreed to pay for a horse at the rate of a barley corn for the first nail, and so on in a duplicate *ratio* to the extent of all the nails in his shoes, which were thirty-two, and would have amounted to five hundred quarters of barley. *Hide*, chief justice, on an assumpsit, directed the jury to give the value of the horse, which was 8*l.* in damages.

Et vide Earl of
Aiglasie v.
Muschamp,
1 Vern. 237.

[* 160.]

And, in cases of the nature now under consideration, courts of equity, when applied to on behalf of the party imposed upon, and courts of law on assumpsit, administer the same measure of justice; for, in both jurisdictions, the contract is considered as a security to the extent of the real value of that, respecting which the parties stipulate. Thus, in the before-mentioned case of *Heathcoate* and *Paignon*, the court decreed that the purchaser should receive all sums advanced by him for purchase money, insurance, deeds, * &c. with 5*l.* *per cent. per annum* thereupon, giving credit for whatever should have been received on the annuity, beyond that rate of interest, as part payment of the principal. And, in the last-mentioned case of *James* and *Morgan*, the contract was considered as evidence of an assumpsit, to the extent of the real value of the horse.

Fear, occasioned by some unlawful violence of one party to a contract towards the other, furnishes, likewise, a good ground for equity to set aside an agreement. First, Because, according to natural right, all undue force, violence, or menace, that obliges men, contrary to their inclination, to give their assent, which otherwise they would not do, takes away that liberty which is of the essence of a valid engagement, and, consequently, renders all agreements, in such cases, null and void. Secondly, Because, although it were admitted, that an agreement entered into under the impulse of fear, might be accounted spontaneous, in as much as a man so circumstanced voluntarily engages in a lesser evil to avoid a greater, yet, there is not still a ground whereon to raise an obligation: Because, every obligation

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obligation on one side must be accompanied with * a [* 161.]
correspondent right on the other; for, there can be no
obligation unless a right answer to it, or be consequent
upon it. Now, no injurious action can produce a
right without a manifest contradiction; therefore,
although the party engaging may be capable of con-
tracting an obligation, the author of the violence is in-
capable to obtain any right by such extorted engage-
ments.

Accordingly, an agreement procured through fear,
though it be entered into with a view to render satis-
faction for the grossest injury that the civil rights of
society can endure, will be set aside in equity.

Thus, where a man caught another in bed with his Anonym. cited
3 P. Will. 294.
wife, and the husband having a sword in his hand, and
being about to kill the aggressor; and the latter, being
naked, and in his power, implored the husband not to
take advantage of him, promising that he would make
him reparation; upon which they went into another
room, where he gave the husband a note for 100l.
payable at a certain time: Lord *Cowper* declared, on
a bill brought to be relieved, that, if the matter had
rested on the original note, which had * been gained [* 162.]
by a man armed from one naked and by duress, though
it happened to have been given in satisfaction for the
greatest injury, he should have made no difficulty of
granting relief.

And it would make no difference, if a contract were
entered into through fear arising from an unlawful cause,
whether that fear were occasioned by a third person,
or by the party to the contract, that is, provided the
latter were cognizant of it.

But, if the fear arise from a just awe or dread of a
third person, who is a lawful superior, and who exer-
cises his authority for a just end, the contract will be
nevertheless binding; because, as has been said, the
person, acting under the influence of fear, consents
spontaneously to submit to what is required of him,
rather than take the consequences that may ensue a
refusal; and the party, with whom the engagement is
made, does nothing to prevent himself from acquiring
a right. This seems to be the principle upon which
Lord *Hardwicke* founded his observation, in the case
of *Cory and Cory*, that a reasonable agreement made

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[* 163.] between a father * and son, with a view to provide something for younger children, ought not to be set aside, on the ground of its having been entered into under the influence of paternal authority.

Vide 2 Vez.
152.

Bargains, *originally* oppressive, as well as those gained through fear, may, by subsequent acts of the party (dealt hardly with, or acting under compulsion) fit to create a right in the other party, be rendered binding; for, where a man is *fully apprised* of his right, and understands what he does, whatever may be the nature of the original transaction, a subsequent confirmation, when fully apprised, will make it good: Because if men, who are *free agents*, will *with open eyes* ratify *invalid* agreements, a court of equity will not relieve them. As if, in either case, the party on whose behalf the equity would otherwise arise, having such relief in his power, and being acquainted with the then state of facts, confirms the transaction.

Cole v. Gibbons, *supra*,
3 P. Will. 293,
294. et vide
1 P. Will. 727.

[* 164.]

3 P. Will. 294.
in note.

Upon this principle it was held by Lord King in the case of *Cole and Gibbons*, and assented to on a re-hearing by Lord Talbot, that the vendor, in this case, having, by a deed of confirmation of the former assignment * (made after he was in possession of the fact of the testator's being dead, of the bill's having been filed, and of the grounds of the executors resisting it) ratified the contract, was bound thereby, and could not be relieved. So it being proved, in the last-mentioned case of the note given to the husband by the person detected in bed with his wife, that the latter, on the husband's coming for the money, and his excusing himself from payment, gave his bond for it; it was held, he ought not to be relieved, as he had coolly, and without any pretence of fear or duress, entered into a bond to the husband, and, thereby, himself ascertained the damages which the husband ought to be paid, which must otherwise have been ascertained by a jury.

But, if such confirmation were obtained fraudulently, a court of equity would break through it, and impeach the original contract, however deeply intrenched behind fortifications of this kind.

Another head of equity, under which agreements or contracts are relieved against, is, that of fraud, collected or inferred, in the consideration of courts of
this

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this description, from * the nature and circumstances [* 165.] of the transaction, as being an imposition and deceit on other persons parties to the original contract, but not parties to the *fraudulent* agreement: Of this kind are marriage brokerage contracts, wherein neither of the parties contracting have been deceived; but which tend necessarily to the deceit of some party to the marriage, or of the parent, or of the friend. On this equity, a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian, will be void.

Thus where, on the marriage of the son of A. with Sir Nicholas Butler v. Sir the daughter of B. it was agreed, that the young couple should have so much for their present maintenance, Henry Chan- and the son privately agreed with the father to release cey, 1 Eq. Ca. Abr. 88. part of it: This agreement was set aside as an imposi- Kemp v. tion upon B. though in that case the son, as was said, Coleman, gave nothing but his own, and he was at liberty to dis- 1 Salk. 156. pose of his present maintenance as he thought fit.

So where, upon a treaty of marriage between A. and Redman v. B.—B.'s father would not consent to the match, by Redman, reason that A. owed two * hundred pounds to C. for 1 Vern. 348. [* 166.] which he and his mother stood bound; the brother and the mother of A. to remove this objection, gave a new bond to C. for the payment of the debt, and thereupon A.'s bond was delivered up to be cancelled; but A. gave his brother a secret bond to indemnify him against the debt and interest: It was proved that B. the wife, was privy to this transaction. *Per curiam*, this is a plain fraud; for, by this contrivance, the father of B. (which B. was the plaintiff, as executrix to the husband) was drawn in to give a greater portion: besides, he absolutely refused to marry his daughter, unless A. was made a clear man, and, in particular, relieved from this debt.

Another head of equity also, particularly applicable to the cases now in discussion, is drawn from public utility, and is a part of the national policy, in that sense in which the word Policy is applicable to every thing that concerns the government of the country, of which the administration of justice makes a principle part; and is that, whereby a court of equity, with a view to public utility, requires that particular persons, in contracts, should not only transact whatever is stipulated,

bona

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- [* 167.] *bona fide*, * between themselves, but also, that they shall not transact *mala fide*, in respect of other persons, who stand in such a relation to either of them, as to be affected by the contract, or the consequences of it.

Pitcairne
v. Osborne,
2 Vez. 375.

Thus, where an annuity-bond was entered into by the husband's father to the wife's uncle as a trustee (she having a mother living) that he, during his own life, would pay 150*l. per annum* to the husband and wife during their joint lives, and to her, if she survived him (the husband) which she did; afterwards a bill was brought to be relieved against this bond, on payment of 100*l. a year*, upon the foundation of an agreement, said to have been made between the husband and wife and father previous to the marriage, whereby it was stipulated, that although the bond was to import payment of 150*l. per annum*, yet the actual agreement was for 100*l. per annum* only. The basis of this secret agreement was stated to have been, that the original agreement was for 100*l. a year*, but that the wife had expectations from her uncle, and nothing of her own, and, therefore, had suggested that her uncle would be induced to do more for her, if the father did more for his son; that, in this expectation it * was agreed, the husband should let the bond run as if it were for 150*l. a year* instead of 100*l. which* would be for the advantage of the wife and children; that the father at first refused, but was afterwards prevailed upon to consent to this proposal; that, accordingly, the husband and wife had received 100*l. per annum*, and she had insisted upon no more, after she became entitled to it in her own right; there was a letter, during the treaty, from the father to his son, wherein it appeared, under his own hand, that the uncle had promised to do something on his part, though the father thought it better not to have it inserted, but to trust to his generosity; concluding with bidding his son go on to marry, and leave the management of the uncle to him; the uncle, on his death, gave every thing to his nieces.

- [* 168.]

It was attempted, in argument, to distinguish the last-mentioned case from the general class of those on this subject, on the ground that the uncle, whom it was calculated to deceive, having neither contracted, nor given any thing on his part, it differed in the material circumstance on which they all turned, namely, "that it was a deceit *practised on a party*;" for the
uncle

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uncle could not be said to be a party deceived. *Sed per* [* 169.]
** curiam*, laying all the transaction together, especially the father's letters, the uncle must be considered as a material party to the agreement on the marriage, and as one intended to be imposed upon by the private agreement of the others; the wife's dependance was upon her uncle, so that he, notwithstanding her mother was alive, must be considered *in loco parentis*. It was true, he was only named as one of the two obligees; but he could be no otherwise a party from the nature of the instrument, nor could the assent of an obligee be shewn otherwise: But he must necessarily be apprised of it. The father's letter to his son during the treaty, shewed *beyond doubt*, that he considered himself as treating with a person who was to provide for his niece out of his own pocket; that the uncle was to do something; and that it was the father's choice that it should be left out of the agreement, and that the uncle's honor should be trusted to. The uncle had fulfilled his expectation. If the uncle had contracted to give ever so little, the secret agreement could not have been supported. Then the father should not avail himself of its being left out of the written agreement, when it was done by his own choice. The whole must be considered, *in * equity*, as an *open* transaction between *four* parties for a treaty of marriage, and a *secret* transaction between *three* of them only in deceit of the *fourth*. The agreement then was fraudulent, and could not be supported. [* 170.]

Upon the same principle, namely, that an agreement is a deceit upon third persons interested, although not parties, it is held, that if a man, being indebted, make a composition with his creditors, by which they all agree to accept of a certain given sum for their debts, provided they all sign within a time limited; and one of the creditors refuse to sign, unless the creditor will pay him one hundred pounds down, and three shillings in the pound over and above the nine shillings; the debtor shall himself be relieved against this agreement: It being fraudulent, by destroying that equality, which was the inducement to the other creditors to come into it.

And, in the case of *Neville against Wilkinson*, Lord *Thurlow* said, that he would not lay it down as a rule, that fraud, in cases of this nature, must be upon an article *contracted for expressly*; but that any representation *misleading* the parties contracting on the subject of

Small v. Brackley, 2 Vern. 602. *supra*.

Neville v. Wilkinson, Novem. 1782. Et vide 3 P. Wil. 75. last edition, in notes.

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[* 171.] of * the contract, was within the principle of the cases. And his lordship relieved, by injunction, against a bond entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question: And this relief was given, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect of the amount of the plaintiff's debts.

And an underhand agreement, although procured after marriage, if made in fraud of a third person, will be set aside in equity.

Yelverton Pey-
ton, et al, v.
Bladwell, et al,
1 Vern. 240.

Thus where A. promised to settle certain estates on B. if a convenient match could be found for him; and, accordingly, treated on a marriage for him with the niece of C. and D. It was agreed between him and them, that C. should give his niece 2500*l.* portion, to be laid out in lands after his death, and that A. should settle lands of 300*l.* a year, whereof 200*l.* a year should be for a jointure; and that he should also settle other lands of the * value of 100*l.* *per annum*, on himself for life, remainder to B. and his heirs. A settlement was made by A. and a bond was given by C. accordingly. *After the marriage*, A. prevailed upon B. on promises of leaving him a greater estate by his will than he had agreed to settle upon him, and by other insinuations, to execute a writing, whereby A. was to receive the profits of the whole estate, allowing B. only 120*l.* a year, and B. was to assign over to him C's bond, and also to release or discharge the agreement for the settling the 100*l.* *per annum* on himself and his heirs after the death of A. The bill was filed by B. in order to be relieved against these agreements. It was insisted, against the prayer of the bill, as to the 100*l.* *per annum* to be settled on B. and his heirs, that B. had power to release and discharge it, and that there was no benefit thereby intended to the wife or issue of the marriage; for B. might have sold or given away those lands. But the court declared its abhorrence of such underhand agreements, that it was a deceit and fraud as to C. who was drawn in to give a greater portion with his niece, in expectation of a settlement adequate to it, which expectation, by this means, was frustrated; for, though B. might have

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* have disposed of the lands which were to have been settled on him and his heirs, yet that was frequently done in many settlements; the father being, by that means, left at liberty to provide for his younger children, and to reward them most that behaved themselves best; but still there was a benefit intended to the issue of the marriage, and it was part of the consideration for which the portion was given. And the underhand release and agreement was held to be fraudulent, and decreed to be set aside, and the original agreement decreed to stand *in toto*. [* 173]

The equity will be the same in favour of a wife deceived by her husband.

Thus where the mother joined in a settlement on her son's marriage, and accepted 15*l. per annum* in lieu of her jointure and claims; but, the day before the settlement was executed, took security from her son for 10*l. per annum* out of an estate not compromised in the marriage settlement, which the son covenanted to pay. The covenant was, after the husband's death, set aside by the wife, as a fraud upon the marriage agreement. Lambev. Han-
man, 2 Vern.
466, 499. Et.
vide Turton,
v. Benson,
2 Vern. 764.
1 P. Will.
496.

* So, if the fraud be practised on the husband, he also will be relieved: Therefore, where a marriage was treating upon between G. and a sister of P. and she, not having so great a portion as G. insisted upon, prevailed with her brother to let her have 160*l.* make up her portion, and gave him a bond for repayment of it, and thereupon the marriage was had: This bond was set aside as a fraud upon the husband. [* 174]

And, in these instances also of underhand agreements in cases of marriage, a person, though *particeps criminis*, and not urged to what he does by necessity, will, nevertheless, be allowed to avoid his own acts: For the fraud infects the agreement throughout, and so doing vitiates it, so as that it binds none of the parties to it.

Thus, in the case of *Redman* and *Redman*, the widow, by whom the suit was preferred, was relieved; although it was in proof that she was privy to the whole matter, and contrived the mode pursued to satisfy her father, in order that the marriage might take effect. Redman v.
Redman, su-
pra, 1 Vern.
348.

So,

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[* 175]

Gale v. Lindo, 1 Vern. 475.

*P So, in the case of *Gale and Lindo*, where the bond was put in suit by the executor of the brother against the executrix of the sister who survived her husband; it was urged that, although the bond given in that case might be a fraud against the husband or his issue, who were to have the benefit of the marriage agreement, yet, the husband being dead, and there being no issue, it was good against the woman herself, and, by consequence against her executor: *Sed per curiam*, that which was *once* a fraud must be *always* so, and the accident of the woman's surviving her husband would not better the case.

But a distinction was taken where the agreement is made between the husband and wife only, and no third person is imposed upon.

Gifford v. Gifford, 1 Eq. Ca. Abr. 88, 89.

Thus, where a son, in consideration of 3500*l.* which he was to have as a marriage portion with his intended wife, covenanted that his father should settle 300*l.* *per annum* on her as a jointure, and the father settled it upon her accordingly, and the son also gave a bond to leave his wife 1000*l.* if she survived; the son died, his wife surviving, and the father pretended that the wife ought not to have * any benefit of this bond, for, that it was in fraud of the marriage agreement; and the case of *Buller and Chancery* was cited. But the court distinguished this case from that, the father having been in *that* case a party to the articles, and deceived by the underhand agreement contrary thereto: whereas here, the son only was party to the articles, and was to have all the portion, and might give it as he pleased: And, therefore, it was decreed, that there should be no relief.

[* 176]

Gale v. Lindo, 1 Vern. 475, 476, et vide *Tunton v. Benson*, 1 P. Will. 496. S. C. 2 Vern. 764. So resolved as to an agreement on marriage, *Shirley v. Martin*, in Exch. 14 Nov. 1779, vide 3 P. Will. 75, in note, edit. 1789.

Agreements in fraud of a third person, that is, such wherein there is *actual* fraud, cannot be rendered binding by a subsequent promise or ratification, even of the parties to them, as agreements fraudulent in the eye of a court of equity, as imposing hardship on one party, may. Therefore, although it was stated in the case of *Gale and Lindo*, that, after the death of the husband, the wife agreed to repay the money, and actually paid part of it, yet, that was considered as of no avail; for, the original contract being *actually* fraudulent in the sense of *deceit*, no subsequent act could purge it of that quality.

Assigning

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* Assigning the benefit of such an agreement [* 177.]
 * over to creditors will not give it a validity; Because Sed per Lord Parker, a bond so given is not so absolutely void, as that it may not upon some new consideration or deliberate act be made good, 1 P. Will. 499.
 the act is not, in equity, considered as an assignment, the subject being in truth a chose in action, but is taken as an agreement only that the assignee shall have all the fair and equitable advantage and benefit of the agreement that the assignor himself is entitled to; and if nothing be bound by the agreement, nothing can be assigned over.

* Nor would the equity of creditors be bettered, though it were shewn that they were in danger of losing their debts through a deficiency, of assets; for, still they must be paid out of the assets of their debtors, and not out of the estate of another man: For, when it is said that creditors are to be favoured, this is meant with regard to the rightful assets of the debtor, not to any effects belonging to another, which the debtor has wrongfully taken away, or possessed himself of tortiously.

But the equitable jurisdiction of courts of this nature of setting aside agreements, as well as that of decreeing them being in a degree discretionary, circumstances may occur, even in cases of agreements, *fraudulent in themselves*, in the sense of deceit, which will induce courts of equity not to relieve against them, or set them aside.

Thus, in the case of *Small and Brackley*, where the plaintiff, having been intrusted to receive the interest due upon tallies, had pledged or mortgaged them to the defendant, and had received the interest *two or three* times, and paid it to her, and brought back the tallies and orders; and, at last, wanting money, he had not only received the interest, but also the principal, and shortly afterwards failed; and then, the creditors of the plaintiff signed a deed to accept a composition of 9s. in the pound, so as all the creditors signed the deed within the time limited, or otherwise the same to be void; but the defendant refused to sign and accept the composition, unless the plaintiff would pay her 100*l.* down, and 3s. in the pound over and above the 9s. in the pound; and the 100*l.* was accordingly paid, and security given for the 75*l.* the residue of the composition money: The plaintiff brought a bill to be relieved against the agreement as fraudulent, being to blind the other creditors, but his bill was dismissed by the chancellor, his Lordship observing

Sed per Lord Parker, a bond so given is not so absolutely void, as that it may not upon some new consideration or deliberate act be made good, 1 P. Will. 499.

* Turton v. Benson, 1 P. Will. 499. et vide 1 Vcz. 123.

* Vide 1 P. Will. 499.

[* 178.]

Small v. Brackley, supra, 2 Vcz. 602.

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[* 179.] * observing that, as the plaintiff had been guilty of as great a fraud and breach of trust as could be without being criminal, and had agreed to make some satisfaction, *he* ought not to be relieved in equity.

Again, where a private agreement was made in fraud of a public contract upon a marriage, the setting aside of which would have been injurious to a former agreement also made upon a marriage; the court considered the *first* agreement as *entitled* to the preference, and therefore refused interposing to set aside the last.

Roberts v.
Roberts, 3 P.
Will. 66.

Thus, where A. son of B. intermarried with C. who had a portion of 4000*l.* and B. (who was tenant by the curtesy) joined in settling a good part of his estate on A. and his wife in possession, the remainder having been previously limited to A. by his mother's marriage settlement, with a power to B. (*first* paying or securing 1000*l.* to his son) to settle 200*l.* *per annum* out of the estates upon any other wife he should marry. B. afterwards proposed to marry D. who had 3000*l.* portion, and, previous thereto, offered to settle 200*l.* *per annum* upon her. But, it appearing that the 1000*l.* must * be paid to A. which would greatly embarrass him (B), D.'s relations would not consent to the match. Upon this B applied to A. to release the 1000*l.* which he, by letter to his father, agreed to do; but neither his wife, nor any of her relations, were consenting to such release. However, previous to an actual release executed, the son insisted that his father should give him a bond for the payment of the 1000*l.* within a short time after his marriage, to which the father consented; but that was done also without the privity or consent of the intended wife, or her relations. Then the release and bond were mutually given, the marriage was had, and the portion of 3000*l.* paid. Afterwards A. sued his father upon the bond, and the father preferred his bill against the son to be relieved against this bond, on the ground of its being a fraud upon the second wife, and her relations, who would not have consented to the match had they known of this under-hand bond. But the court was of opinion, that the bond must be paid; because, whatever arguments might be made use of in favour of D. the father's second wife, or of himself, to prove that he ought to be discharged of the bond for payment of the 1000*l.* the very same arguments might be urged

[* 180.]

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* urged on behalf of the son and his wife, to prove [* 181.] that it ought to be paid; for, suppose it to be a hardship upon the father's second wife, that her husband should be forced to pay this 1000*l.* in breach of the public and open agreement made by the son, was it not equally an hardship, upon the son's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000*l.* should not be paid upon the father's making a second jointure? The consequence of which was, that as the agreement on the son's marriage was the first, it ought to have the preference. *Qui prior est in tempore, potior est in jure.* Wherefore, since the payment of this 1000*l.* by the father, might as much contribute to the comfortable subsistence of the son and his wife, as the non-payment of it might conduce to the comfortable living of the father and his wife: and as, by means of this bond, the son had the law on his side, the bond, it was determined, must be paid.

Upon the same principle of national policy (to prevent catching bargains with heirs, reversioners, or expectants, which have a tendency to seduce them from a dependance on * their ancestors, who, it is presumed, will support them properly, by feeding their extravagancies, and tempting them, in their father's life time, to sell their reversion of estates settled upon them, or to barter away their expectancies on terms manifestly ruinous) a court of equity uniformly sets its face against all bargains made with persons so circumstanced. And the court of Chancery has at length, not without great difficulty, put a stop to so destructive and mischievous a practice, by setting aside all contracts made with heirs or expectants for the disposal of their expectancies; considering them as intrinsically corrupt, fraudulent, and unconscionable, encouraging disobedience and extravagance in heirs and expectants on one hand, and avarice, fraud, and imposition on the other. And indeed, in most of these cases, deceit and illusion on other persons, not privy to the fraudulent agreement, has concurred; the father, ancestor, or relation, from whom the expectation of the estate has sprung, have been kept in the dark; the heir or expectant has been prevented from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and reformation; by this the ancestor also had been misled, and

Vide Earl of

Arglairs v.

Muschamp,

1 Vern. 75.

[* 182.]

Nott v. Hill,

ibid. 167. Earl

of Arglairs v.

Pitt, ibid. 239.

Berny v. Pitt.

2 Vern. 14.

Twissleton v.

Griffiths, 1 P.

Will. 310.

Earl of Ches-

terfield v. Jan-

sen, 2 Vez.

125.

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[* 183.] and * induced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil before hand.

And, although such bargains be actually carried into execution, courts of equity will, nevertheless, if the performance be occasioned by the apprehension of compulsion, set them aside, and decree the vendee to reinstate the vendor in his expectations, on payment of what was actually advanced and legal interest.

Curwyn v. Milner, 19th June 1731, 3 P. Will. 292 in notes.

Thus, where an heir about twenty-seven years of age, and who had a commission in the guards, borrowed 500*l.* on condition that he should pay 1000*l.* if he survived his father and father-in-law; but if he died before his father and father-in-law; then that the lender should lose the 500*l.* The heir surviving his father and father-in-law, was relieved by Lord King against this bargain, although he had paid the money, *the payment having been made for fear of an execution.*

And relief was decreed in equity, on a rehearing, upon a contract of a similar nature, after the money had been paid, *in compliance * with a former decree, made in support of the contract.*

[* 184.]

Berny v. Pitt, 2 Vern. 1, 4. 3 P. Will. 294. *Knott. et al. v. Johnson, et al.*, *ibid.* 27.

In the case alluded to A. had supplied B. an heir in his father's life time, with the two several sums of 1000*l.* and 1000*l.* on condition to have 2500*l.* for each, if B. survived his father, or else the principal to be lost; and A. had obtained from B. two judgments of 5000*l.* a piece defeazanced for the payment of the said 2500*l.* for each; and Lord *Nottingham*, on the first hearing (9 Feb. 33 Car. 2.) granted relief only against the penalties; but, on a rehearing before Lord *Jefferys* (27 Jan. 2 Jac. 2.) the former decree was discharged (though B. had been constrained, in obedience to the decree, to pay A. 539*l.* and B. was ordered to be restored to the money paid *ultra* the 2000*l.* originally lent and the interest for the same, with interest from the time A. had received it.

And no subsequent acts of the heir, though voluntray, and not under any apprehension of legal dures, will help such a contract, if the heir at the time be under any misapprehension, and not fully apprised of the nature of his right: As if the heir write letters after the death

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* death of his ancestor, approving of the bargain as fair; [* 185.]
or suffer the vendor to lay out money afterwards in beautifying and improving an estate, purchased under such circumstances.

Thus, where T. B. the son of R. B. (which R. B. *Baugh v. Price*, was tenant in tail, remainder to himself in fee of an ¹ *Wils. 320.* estate, worth about 3000*l.* and about seventy-two years old, afflicted with the gout and a rupture, and his life not worth above one year's purchase) being heir expectant in tail, and in *necessitous circumstances*, by articles of agreement in *October 1739*, in consideration of 1500*l.* to be paid to him by P. (who was an attorney concerned for R. B. and conversant with his family settlements) within a year; and of an house worth 200*l.* to be conveyed to T. R. covenanted, without the knowledge of his father, to convey to P. this estate in fee simple, subject to the estate of his father for life; and soon after the signing these articles, T. B. was desirous to be off the bargain, but P. would not let him. In *November 1739*, a lease and release was prepared by P. and executed at P.'s house, where nobody but P. his son, and another person were present. T. B. therein, among other things, covenanted that he was seised in fee, * and that there was in the deed a clause of warranty against R. B. and his heirs, and the use of a fine formerly levied by T. B. was declared to enure to P. in fee; and in consideration hereof, P. conveyed to T. B. the house, but in the latter conveyance there was no such covenant or clause of warranty as in the former. The 1500*l.* in money was to be paid. P. made out that he paid it thus, *viz.* to Lord O. 550*l.* owing to him by T. B. on a mortgage of another estate; 200*l.* T. B. owed to P. himself; 250*l.* which P. pretended he paid him in cash; and for the remaining 500*l.* P. gave T. B. a bond, to pay it within a limited time after T. B. should have suffered a recovery to P.'s use. All the writings were drawn by P. and T. B. had no copy of them, or was any counsel or attorney concerned for him. R. B. the father, died in *July 1740*, nine months after making the articles. T. B. immediately wrote to P. acquainting him of his father's death, and informing him that he should act in all respects agreeable to his wishes; and in another letter he told P. that he should always act justly, and said that P. has got a good bargain of him, and that he could afford to give him a buck, but that he should
not

[* 186.]

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- [* 187.] not touch one without P.'s * consent. After this T. B. filed a bill in Chancery, to set aside these articles and conveyance, and to be relieved; to which P. put in an answer denying the fraud, &c. charged. T. B. being at this time indebted to P. was, by being threatened to be sued and other acts, intimidated from proceeding in Chancery, and prevailed upon to execute another deed, dated in *October* 1741, reciting the proceedings in Chancery, and that the purchase was a fair one, and confirming the estate to P. afterwards T. B. and P. settled all accounts. In 1743, T. B.'s bill in Chancery was dismissed, and in 1746 he died. Soon after which T. B.'s son preferred a bill in the Exchequer to be relieved from this bargain, upon paying to P. the purchase money and interest, and for all necessary and permanent repairs. And it being held, first, that this transaction, under all the circumstances of it, was *clearly* fraudulent, and such as the court of Chancery would have relieved against in the first instance; the next question was, whether T. B. by any act, subsequent to the bargain, had purged the fraud and imposition? And the court were of opinion unanimously, that he had not, and that the son ought to be relieved; for
- [* 188.] that, as to the * letters, which had been relied on as shewing that T. B. thought the bargain a fair one, they availed nothing, being written before he knew the real value of the estate; and that the arts and threats used by P. to get rid of the first suit, were as fraudulent as the original bargain, and the recital in the release executed thereupon was false; for the bargain was a very unfair one, and *suppressio veri*, or *suggestio falsi*, had always been held sufficient to set aside a release. And, as to the charge that T. B. had stood by during his life, and seen P. lay out great sums in repairs, ornamental additions, &c. T. B.'s acquiescences were founded on a mistake into which P. led him. And the articles and deeds were decreed to be set aside, on the plaintiff's paying the defendant his principal and interest, and allowing for all needful repairs.

Chettersfield v.
Jansen, 2 Vez.
159.

But, if a contract for an expectancy be *expressly* shewn to have been free from fraud or imposition, and the vendor, being fully informed and with his eyes open, ratify the contract, he will, by such new agreement, bar himself of the relief he might otherwise have had in a court of equity. But such ratification must be
after

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*after full information, freely, without compulsion, * and at a time when the vendee is free from all restraint or apprehension from the person on whom the expectancy rests; and when it cannot be said, that there is any person on whom any deceit can be committed by reason of such new agreement, and there is no impediment against the party, supposed to be imposed upon, seeking relief, by disclosing his case to a court of justice.* [* 189.]

And, if an agreement be entered into under an undue influence, and in circumstances of such a nature as furnish a fair inference, that one of the parties had an advantage over the other, it will be set aside in equity. Duke of Hamilton v. Lord Mohun, 1 P. Will. 118.

Therefore, where A. married the heiress of G. and the marriage articles were agreed on with great deliberation, and one of them was, that A. should, within two days after marriage, for the peace of the family, release to the mother and guardian of the lady all accounts of the mesne profits of the estate; it being insisted upon by the mother, and admitted by A. that the charge of the education of the young lady, and the interest paid by the mother upon the mortgage of a good part of the estate, which had been discharged by her as guardian, would come to as much as the * profits [* 190.]

The lord chancellor said, on making the decree upon a bill in equity filed by A. to be relieved from this agreement, and for an account of the mesne profits of the estate, that, admitting there was no surprise in obtaining this covenant from A. (and there seemed to have been none, it having been agreed upon after great deliberation and advice by consent on both sides) and admitting there had been no concealment of the matters to be accounted for, this covenant to make such release ought nevertheless to be set aside; as it seemed to be extorted from A. by one who had power over the young lady courted by him, as her parent, which power ought not to have been made use of in this manner; that it was as if the mother should say, you shall not have my daughter unless you will release all accounts: That brought the case within the same reason as marriage brocage agreements; for a bond to give money if such a marriage could be obtained was ill, and, by the same reason, a bond to forgive a sum of money, must be ill. And the covenant was relieved against.

Sid note, such release, had it been given by the husband, after marriage, might have been good; the reason of the difference is, because, being given after marriage, it must be presumed to have been given freely, ibid. 120.

A court of equity will rectify errors in their proceedings
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- [* 191.] * ceedings, although there be an agreement entered into by the parties to a suit, to abide by the decision of the court on the merits, notwithstanding any mistake in form.

Buck v. Fawcett, 3 P. Will. 243.

Thus where, upon a bill brought in equity, the parties or their clerks in court entered into and signed an agreement, which was afterwards by consent, made an order of court; that both parties would submit to such decree as the court should make in the cause, provided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal; an order for a re-hearing was directed to stand, although a motion was made, upon the ground of the preceding agreement, to discharge it: The chancellor observing that, had the agreement been disclosed to the court, such order would not have been made; for, until a decree was signed and inrolled, all matters were open; and if there was any error in a decree, it was fitting the court should have an opportunity of amending it.

- [* 192.] Where an estate is directed to be sold before a master, any agreement respecting it, to take * it out of the ordinary course of sale, in such cases, will be void.

Annesley v. Ashurst, 3 P. Will. 282.

Therefore, where a trust estate was decreed to be sold for the payment of debts and legacies to the best purchaser before the master, and A. contracted for the purchase, and entered into articles with the trustees for that purpose; and it did not appear that the purchase was an unfair one, but this method seemed to have been taken to avoid the charge and trouble of bidding before the master, and of the master's report, and of getting it confirmed; the court, (on a bill against the trustees to compel them to convey, which they were willing to do on being indemnified) would not make a decree; saying, this was all going out of the way; the former decree must be pursued, and one decree could not be made to contradict another. If A. wished to purchase the estate, he must go before the master, and get himself reported the best purchaser; and, though nothing unfair appeared, yet there was every occasion to suspect when people were going out of the way.

2 P. Will. 156. An agreement to stifle a prosecution of felony is

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* is not lawful, and cannot be executed in equity; [* 193.] but where there is a fraud, and the party wronged by the fraud comes to an agreement whereby he is to be satisfied for such injury (as in conscience he ought to be) this agreement, it is said, is lawful, and may be enforced in equity; matters of fraud being cognizable and relievable, as well in equity as at law.

But the distinction above-mentioned, between an agreement respecting fraud, and one respecting felony, and which is stated by *Peer Williams* as an observation made by himself in the case of *Johnson and Ogilby*, does not seem warranted by the event of that case in which the point occurred.

There A. (appearing to be a single woman) and B. ^{Johnson v. Ogilby, et al, 3 P. Will. 279.} had some differences as to several freehold houses; and, upon compromising those differences, it was agreed between them, that A. and B. should join in a fine and recovery, which should be as to two of the houses to the use of A. and her heirs; and as to the other two houses, to the use of B. and his heirs. A fine and recovery were accordingly levied and suffered. After this A. pretended that she was, at the time of these transactions, a married * woman, and wife to C. Hereupon B. brought a bill against C. and his wife to discover whether she was married, when she levied the fine, and suffered the recovery, and to be relieved against the fraud. To this bill C. and his wife put in their answer, insisting on her being then a feme covert, and that she was not bound by such fine and recovery. Upon this B. preferred a bill of indictment against A. for a cheat, and for the fraud in levying a fine, and suffering a recovery as a feme sole, when at the same time she was under coverture. The indictment being found, upon not guilty pleaded, was brought to a trial; but just before the trial was to come on, the parties came to an agreement, that B. should assign over his right to the premises, and that C. and A. should pay him 580*l*. Afterwards, the money not being paid, B. filed a bill for a specific performance. And the lord chancellor started the objection, that this agreement being to stifle a criminal prosecution, ought not, therefore to be executed in equity. In reply to which, *Peer Williams* states himself to have suggested the distinction before alluded. But it appearing by the reg. book that the cause coming on to be heard, &c. his lordship declared, ^{Vide 3 P. Will, 4th edit. fol. 279 note 1.}

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[* 195.] “ the agreement * in the bill mentioned, was not such
 “ an one as ought to be carried into execution in that
 “ court, and that, the plaintiff not paying a foreclosure,
 “ the bill was dismissed;” it seems a necessary inference,
 that the distinction taken was over-ruled.

Gould v.
 Fleetwood,
 Mich. 1732, at
 the Rolls, cited
 3 P. Will, 251
 in note.

All bargains by trustees, made in behalf of them-
 selves, and tending to eat up the trust property, are
 discouraged in equity. Therefore, where an execu-
 tor in trust, who had no legacy, and where the execu-
 tion of the trust was likely to be attended with trouble,
 at first refused, but, afterwards, agreed with the re-
 siduary legatees, in consideration of one hundred gui-
 neas, to act in the executorship; and, he dying before
 the execution of the trust was compleated, his execu-
 tors brought a bill to be allowed these two hundred gui-
 neas out of the trust money in the hands of the residuary
 legatees, insisting, that the residuary legatees might as
 well make a contract with the executor touching the
 surplus which was their own property, as the testator
 himself; and that no harm could happen thereby to the
 trust estate: The court said, that all bargains of this
 kind ought to be discouraged, as tending to eat up the
 trust; and that *here the executor * had died before he had
 finished the affairs of the trust. Wherefore the plaintiff's
 demand was disallowed.*

[* 196.]
 Quære? If this
 accident affects
 the principle as
 against trustees.

An agreement may be set aside by reason of a mis-
 take in the parties making it, if the point misconceived
 be the cause of the agreement; for, if an agreement
 be entered into upon the presumption by one of the
 parties of a fact, that is not really so as that party be-
 lieves, the agreement as to him is of no force; because
 he did not give his assent to what is agreed upon abso-
 lutely, but upon such and such conditions, which are not
 verified by the event.

Lansdown v.
 Lansdown,
 Mosely 364.

Thus, where there were four brothers, and the se-
 cond died, and the elder brother entered upon his
 lands, and the younger brother claimed a title, upon
 which they applied to B. a schoolmaster, their neigh-
 bour in the country (who often acted as an attorney) for
 his opinion, who, upon consulting a book called the
 Clerk's Remembrancer, gave it in favour of the young-
 est brother, because lands could not ascend; upon
 which the eldest brother agreed to divide the estate
 with the youngest, and declared, he would rather do
 so

*Schoolmaster
 Case*

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so * than go to law, though he had the right. Deeds of [* 197.]
lease and release of the moiety, were accordingly prepared by the school-master, which were executed by the eldest brother, and also bonds given in the penalty of 300*l.* which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares. Then the youngest brother died, and the moiety descended to the defendant, an infant, his son and heir. And, on a bill filed to set aside these writings, the lord chancellor decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff (the eldest brother) they having been obtained by mistake and misrepresentation, and that the defendant, the infant, should, when he came of age, convey *nisi*.

Upon the same principle it has been held, that if a party, at the time of entering into an agreement respecting a claim, capable of being precisely ascertained, be, at the time of contracting, ignorant of the precise value of it, but stipulates *under an idea*, and with an intent, that what he is to receive shall be *equal* in value to that which he has a claim to; this will furnish a sufficient ground to a * court of equity to [* 198.] set aside the agreement, if the thing to be received turn out not adequate to the price of the claim, when its value is accurately adjusted.

Thus, where one died intestate, leaving a widow Cocking v. Pratt, 1 Vez. 400. and a daughter, the latter being of age, and they entered into an agreement concerning the distribution of the personal estate. A bill was afterwards filed by the husband and representative of the daughter, who was dead, to set aside this agreement, and to have a distributive share of the father's personal estate, to the amount of what his wife was entitled to. The mother insisted upon the agreement, as a defence against going into an account of the father's personal estate. But the court held, that the bill was proper, and the rights of the parties the same as when the wife was living. The question was, *what was in view on each side?* the daughter *clearly* did not *intend* at the time of the agreement, to take less than what by law she was entitled to, though what that amounted to did not clearly appear: But she *then* thought what was stipulated for her was *her full* share. It was a sufficient foundation, therefore, for a court of equity to interfere, in such case, if it appeared

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[* 199.] * appeared that the personal estate amounted to considerably more than what she conceived, and the party suffering might apply to such courts to avail himself of want of knowledge of that fact, not, indeed, in the case of a trifle; but the daughter here would be entitled to five or six hundred pounds more than was stipulated for, which was a material sum in a small concern, and a ground for the court to set it right. The daughter did not act on the ground of a composition, as wanting to marry, and to have ready money, but took what was agreed to be paid her as amounting to her full share of her father's effects; and, if it appeared not to be so, the court could not suffer the agreement to stand. The estate, therefore, must be divided as the law directed, and the agreement set aside.

Ibid.

It is observable that, in the preceding case, the daughter's husband had ratified the agreement, and released to the mother: But as his intent was the same as the daughter's, and he was equally in the dark, that was considered as making no difference in the equity.

Griffith v.

[* 200.]
Trapwell,
1 Vez. 401.

And, where one died intestate, leaving two sisters, one of whom got administration, and * prevailed on the other to accept of an agreement for her share; and there was a further agreement that she should have a further share, reciting also, that it was intended that she should have an equal share, and that there should be a decree for that, which was accordingly had: It being afterwards discovered that the estate was a great deal more than it was then valued at, both the agreements, and the decree thereupon, were set aside on a re-hearing.

Wide supra.
142—146.

We must be careful to distinguish cases of the nature last-mentioned, from those where the right or thing stipulated about is of itself doubtful, and no ignorance or want of information can be pretended respecting it; for, in cases of that kind, it is not necessary for a court of equity, after an agreement, if there be not a plain mistake, contrary to the intent of parties, shewn, to resort to the original right of the parties: "*That the right is doubtful,*" is a sufficient ground to support an agreement respecting it.

An agreement for sale of an estate, which, from the nature of it, when compared with the circumstances
of

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of either of the parties to * it, furnishes decisive evidence of his being surprised, will be set aside in equity, although there be no surprise, fraud, or circumvention actually proved, and though a conveyance have been made pursuant thereto. [* 201.]

Thus, where a steward, that had been for many years employed in the management of an estate, articulated with a person, employed by the owner thereof, to become the purchaser at 15,000*l.*; and by the articles it was stipulated, that he should either pay the whole in money, or might return lands to make up what he paid short in money of the 15,000*l.* Pursuant to these articles, the purchaser obtained a conveyance of part to himself at an under-value, alledging, that it was not material what sum was mentioned to be the consideration of the conveyance, in regard he was to make up the whole 15,000*l.* and had sold other parcels and paid the money, amounting to 4500*l.* as the vendor appointed, and would now return so much land as should make up the 15,000*l.* The court, on a bill brought by the vendor for that purpose, set aside the articles and the conveyance made to the vendee, except as to so much as he had sold to other purchasers; declaring, that they looked * upon the vendee but as an agent for the vendor, and one in whom he had reposed great trust and confidence, which the vendee had deceitfully abused; and that the articles themselves seemed to manifest surprise, the vendor having occasion to sell to raise money, and yet the articles left the vendee at liberty to pay as small a sum of money as he pleased, and return what of the lands he thought fit to make up the value. And this decree was affirmed on appeal. Whorwood
v. Simpfen,
2 Vern. 185.

But, in the foregoing case, the court assumed to itself a greater latitude; because the vendor had elapsed the time prefixt by the articles, in which he was to make good the entire payment by money, or to return the lands. [* 202.]

Again, Where a lease for three lives came to a man's three daughters, as co-heirs and special occupants; there being a suit in Chancery touching this lease, the husband of one of the daughters, fearing to be in law, and being made to believe that he should be forced to pay costs, released the arrears that should be coming to him for his share of the rectory to the other Gee v. Spelman's three daughters, as co-heirs and special occupants, 1 Vern. 32.

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[* 203.] other sisters, who were to * bear the charge of the suit: And his share of the arrears amounting to one thousand pounds, this release was set aside on the ground, that a misapprehension of the party should avoid it.

Vide Meade v. Webb, Brow. Ca. Par. 407. et vide Broderick v. Broderick, 1 P. Will. 241.

If, in *entering into* a treaty for an agreement, there be a wilful and industrious concealment of the truth in a material point by one party, in order to keep the other in ignorance, and to profit thereby; that will be considered as a gross fraud, and be a ground, in equity, to set aside the contract; especially if such concealment be accompanied with misrepresentation, and a premeditated intention to deceive: As if a man's agents, on a treaty for a lease, misrepresent the quantity of land proposed to be demised, to be one hundred acres more than what it really is; and this misrepresentation being made in the presence of the principal, he, by not contradicting, in effect confirms the truth of what they say; and it be in proof that this is done before the execution of the agreement, and at a time when the lessor has caused a survey to be taken, which ascertains the exact measure and limits of the premises, and yet he does not think proper to undeceive the lessee, but purposely conceals the true measure and quantity from him, this will be * a sufficient cause for a court of equity to set aside the agreement.

Vern. 60.

If a bill be brought for performance of a thing, for the non-performance of which a penalty is recoverable at law, the plaintiff must, by his bill, waive all benefit of forfeiture, or it will be a good cause of demurrer.

A court of equity will not suffer any advantage to be taken of a penalty or forfeiture annexed to an agreement, where the substance of the contract may be obtained, notwithstanding the penalty be not levied.

Strode v. Parker, 2 Vern. 316. Holles v. Wyse, 2 Vern. 289. Nichols v. Maynard, 3 Atk. 520.

Therefore where, on a bill to foreclose a mortgage, it appeared, that the interest was, by the deed, agreed to be *5l. per cent. per annum*, payable half-yearly; and if not paid by the space of two months after the time of payment appointed, then to be raised to *5l. 10s. per cent.* for increase of interest; the interest being in arrear, the question was, at what rate it should be computed? And it was decreed to be computed at the rate of *5l. per cent. per annum* only: For the increase of interest on non-payment at the day, operated in nature of a penalty, and therefore was relievable in equity.

Nor

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* Nor will equity permit any advantage to be taken [* 205.] of a penalty or forfeiture, where compensation can be made.

But, in cases where the covenant or agreement *Wafer v. Mowat* actually operates by way of penalty, the court, to avoid being arbitrary, will not relieve, unless in cases where it can give some compensation in damages, and where there is some rule to be the measure of those damages. And, therefore, if a lessee for years covenant not to alien without licence of the lessor under penalty of forfeiting the lease, and afterwards assign or alien without licence; equity will not relieve against this forfeiture, because there is, in such case, no rule whereby to measure the damages. *cato, 9 Mod. 112, 113.*

So, where marriage articles provided, that, in case the husband did not, within two years after the marriage, settle such a jointure on the wife, as thereby was agreed to be settled, then the husband should only have the interest of the wife's portion paid him during his life; and the wife died within the two years, he not having settled the jointure, which by the articles he was obliged to settle: A bill brought by the husband to be relieved against * the articles, and to have the portion (insisting that if he at any time settled such jointure upon his wife, though not within the time prescribed by the articles, he would have been relieved against the articles, and have had the portion decreed him) was dismissed. The reason for which dismissal seems to have been, because no compensation could be made after his wife's death, since no jointure could then be settled on her. [* 206.] *Vernon 68, 69. Vide supra. 19—21.*

So, where one by articles made upon his marriage was to receive 4000*l.* portion with his wife, *viz.* 1500*l.* in hand, and 2500*l.* more, if he made a settlement in the space of three years: The marriage took place, and the wife died within two months, and before the husband had made a settlement pursuant to the articles. And a bill exhibited by him to be relieved, was dismissed. *Colonel Cheek's case cited ibid.*

Again, where one being employed by the *East India* Company as their chief agent in *India*, covenanted that he would not trade for himself, or any other, in several commodities, under penalty of so much *per* pound; and the penalties greatly exceeded the value of the commodities. The covenantor having purchased *Blake v. East India Company, 2 Chan. Ca. 198.* This case may likewise be supported, on the ground

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[* 207.]
that it was a
national cause
and concern-
ment, and if
not upheld,
the company
might have
been ruined.

* purchased the prohibited commodities, the company sued for the penalty in an action of debt for 26,000*l*. The defendant filed his bill to be relieved; and though he proved, that it was for the benefit of the company that he so traded, for whatever he bought he sold to them at a just and market price; and that if he had not provided such goods, the company could not have been supplied; and that such dealings were necessary for the supply and benefit of the company, with other favourable circumstances, yet the bill was dismissed: The reason for which seems to have been, that no compensation could have been made, it being impossible to ascertain what damages might arise to the company from such trading, by the encouragement it would give to other people.

Equity will not relieve against an agreement, although from the terms of it, it seems to be in the nature of a penalty, if it be not really so.

Small v. Lord
Fitzwilliams,
Prec. Ch. 102.

[* 208.]

Thus, where A. sold an estate to B. covenanting against incumbrances, and particularly against his wife's dower. Afterwards B. * articted to sell to C. and in the articles it was agreed, that C. should retain 400*l*. of the purchase money in his hands for two years without interest; and if, in that time, the wife of A. released her dower, C. was to pay the 400*l*. or else to retain it absolutely. A. died; his widow did not release her dower within two years, on the contrary, she brought her writ of dower, but died before a recovery of it. Then the vendor filed a bill to have the 400*l*. paid, urging, that it was but in nature of a penalty to secure against the dower, which was then at an end. But it was alledged on behalf of the vendee, and the court coincided in opinion, that the money retained here was not in nature of a penalty, but the retention was part of the terms of the agreement, and the measure of the satisfaction for the contingent incumbrance of dower. And as, had the wife recovered the dower, and lived several years, the vendee could have had only the 400*l*. and would not have been permitted, at least in equity, as assignee of B. to sue the covenant of A. against his own agreement in writing, which took notice of the dower, and the covenant and agreement to retain the 400*l*. as a recompense for it; so that the
vendee

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* vendee ran the hazard of her living, he ought to have [* 209.]
the advantage of her dying. And no relief was given.

So where, among other clauses and covenants in a lease of lands, in *Ireland*, for lives, renewable for ever, dated in 1719, there was one that the lessee and his heirs, with all their family, should, within one month from the commencement of the lease, live on the estate during the continuance of the lease, and of every other to be made pursuant to the intent thereof; and that, when he or they should fail so to do, the rent of 125*l.* 18*s.* 9*d.* therein reserved, should rise to the sum of 150*l.* and so continue yearly to the end of the then demise, and of any other demise thereafter to be made pursuant to the covenant for renewal, &c. In 1729 the lease was renewed. Then these leases were assigned, and the assignee in 1748 quitted the premises and never resided upon them afterwards. In *August* 1751 the agent for the head landlord demanded the increased rent of the assignee of the lessee, who freely paid it, being a year and a half's arrear; but, at demanding, on the 5th of *November* following, another year's arrear, the lessee refused to pay it: whereupon * the

Ponsonby v. Adams, et al.
6 Bro. Par. Ca. 417, et vide Rolfe v. Peterfon,
6 Bro. Par. Ca. 470.

lessor distrained for it, and the tenant replevied, and the landlord avowed, and proceedings at law were going on for recovery of the rent. Then a bill was filed by the assignee to be relieved from this covenant, and, on his behalf it was urged, that this covenant for the perpetual residence of the lessee and his heirs, with all their family, was repugnant to the nature of the estates demised, contrary to reason, in restraint of natural liberty, and against the policy of the realm; that, if good in law, yet, being inserted only for the sake of improvement, and to secure the rent reserved, the same had been substantially performed; and the design thereof answered to the head landlord, as the lands had been always kept well stocked with more than sufficient to answer the rent; that the large fine paid by the under lessees shewed the lands to be of considerable value above the head landlord's rent; and that the additional rent was in the nature of a penalty, and relievable against in equity. But, on the other side, it was urged, that there was no ground for the interposition of a court of equity to prevent the question being tried at law, where it was disputable; and that the lessees should have established their titles there before they came
into

[* 210.]

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[* 211.] * into a court of equity for relief; that, had the immediate lessee applied to a court of equity for relief against the covenant objected to, he must have been sent to law to try how far that covenant was or was not reasonable: For, supposing it unreasonable, unlawful, or waived by any act of those under whom the lessor claimed, all these were mere legal questions no way cognizable in equity; that the benefit was claimed as appendant to the inheritance, and, as such, being a matter of freehold, was triable at law only. But it was said, that the covenant in question was founded on the truest principles of law and policy. The former supposed the lessee resident upon the demised lands, manuring and improving them for his own and his landlord's benefit, whose rent arose from such industrious manurance and improvement of the tenant; that a clause of residence on the demised premises, with an increase of rent attending the failure, was not a penalty, like the forfeiture of a man's estate upon non-payment of a sum at a certain day, but was a mutual agreement for public benefit; the landlord letting his land at an easy rate, whence the tenant, by raising a comfortable subsistence for himself, would consequently * benefit the community by supplying it with the produce of that land: But, upon neglect of so important a consideration, he justly subjected himself to an advanced rent, as a compensation for the breach of both a private and public trust reposed in him by the landlord. And upon these grounds the bill was ordered to be dismissed.

Note. The question arose on an estate situate in Ireland, where, from disturbances, &c. no opportunity had been given

[* 212.] for improving the country by agriculture.

Note. The assignees paying the arrears of increased rent, when demanded, seems to obviate any conclusion to be drawn from the lessor's omission previous thereto.

It was contended in the preceding case, that, as no demand for the advanced rent had been made from the commencement of the non-residence in 1748, until *August 1751*, although the head landlord and his alienees well knew of it; and, as he had accepted the reserved rent, given receipts for it in the usual manner without demanding any additional rent, and twice renewed the original lease without making any claim of the same, this acquiescence and these acts of the lessor amounted to a waiver of the penalty and covenant; especially as against the assignee, who was a purchaser for a valuable consideration, and ought not then to be resorted to. *Sed non allocatur*; this being part of the original agreement, which must continue as long as the lease, how often soever renewed, unless discharged by mutual consent.

In

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* In all cases where an agreement is voluntary, and in [* 213.] favor of one of the parties; the condition, although penal in its effect, will be binding on the favored party, if the agreement be not strictly performed.

Thus, where a creditor agreed to take a sum of money less than his debt, so as it were paid precisely by such a day, and the debtor failed of payment; a bill filed by the debtor, suggesting some equitable causes why he did not pay precisely at the day, and stating that he tendered the money a day or two afterwards, was dismissed as containing no equity. Vern. 220.

d So, where a mortgagee lends money at five *per cent.* but agrees in the deed, that if the money be paid within three months after it becomes due, he will accept of four *per cent.*; if the mortgagor does not pay the money within the time fixed, he will be decreed to pay the interest at five *per cent.* d Jury v. Cox. Pre. Chan. 160. Barnard 481. Nichols v. Maynard, 3 Atk. 520. et vide Barrel v. Sabine, 1 Vern. 268. Vern. 456.

And, where a father made a voluntary settlement on his eldest son, with a *proviso*, that if he did not pay to his younger brother 600*l.* at his age of twenty-one, then the estate of the eldest son, both at law and in equity, * should cease, and, if the money was not paid, the father granted away the estate: The court would not relieve the son, in regard the conveyance was purely voluntary, and the father might put what conditions and restrictions he thought fit upon the eldest son. [* 214.]

But, if (on an agreement by a creditor to take a less sum than his original debt, provided it be paid on a day certain) the original security be bettered by the addition of other persons added thereto; it seems questionable whether equity will not relieve, on default of payment of the lesser sum at the time stipulated.

And equity will give relief against the penalties of bonds for performance of covenants, &c. and for that purpose such courts frequently send the parties to a trial at law, to ascertain the damages in a *quantum damnificatus*. Vide 1 Sid. 442.

[* 215.] * Of the Principles on which Courts of Equity refuse to interfere in Cases of Agreements.

Vide 1 Ch. Rep. 84, 85.

1 Vez. 447.
Armiger v. Clerk, Bunb. 111. et 2 Eq. Ca. Abr. 19. Pl. 13, in note, Cudd v. Rutter, 1 P. Will. 570.

THE principle, upon which courts of equity retain bills for the specific performance of agreements, being, their having power to give a more complete remedy, and render more adequate justice, according to the intent of the parties, than courts of law; not by binding the interest in the lands, but by enforcing the party by *subpoena* to carry the contract specifically into execution; it is a general rule, that wherever a matter respects personal things, and lays merely in damages, *there* the remedy is at law only: As well because courts of law can give as full and effectual a reparation in such cases as courts of equity, as because the ascertainment of damages is the proper business of a jury, and cannot be adjusted by the conscience of a chancellor.

[* 216.]
Vide Allport v. Thomas Gilb. Rep. Eq. 227. et Dupins v. Duke of Kingston, there cited.

* But although, in cases where the relief may be as effectually had at law as in equity, the court will, if the agreement be denied, and the relief demurred to, dismiss the bill; because the agreement must be established by a jury before it can be carried into effect, and, after it is established, lays in damages only: As, if a bill be brought on a covenant to pay a certain sum, and the deed is denied; yet, if the relief be not demurred to, but the defendant answers (whether he denies the agreement or not) the court will decree thereupon on the hearing; because the defendant admitted the jurisdiction, by answering and putting the agreement in issue, and not demurring.

But in such case, if the agreement be denied by the answer, and be not proved in the cause by two witnesses, but only by one; the court will make an order to try it at law, and retain the case upon the equity reserved.

1 Eq. Ca. Abr. 17. 1 Bac. Abr. 69. Chan. Rep. 158.

Another exception to this rule, as to cases laying in damages only, is taken, where any matter of fraud is mixed with the damages; for this brings the case with-

in

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in the *proper* * jurisdiction of a court of equity, which [* 217.] will then retain the bill, and direct an issue to ascertain the damages upon a *quantum damnificatus*. As if A. bring an action of covenant at law for damages, and B. file a bill for an injunction, upon the equitable suggestion, that the covenant was obtained by fraud, there if A. file his cross bill for relief upon that covenant, the court will retain it; because the validity of the covenant is brought into dispute in that court, and on a ground properly cognizable there: And therefore, if the validity of the deed be established, the court will direct an issue to ascertain the *quantum* of the damages.

And, even where no fraud is *suggested*, if, from the nature of the agreement, a specific execution is necessary to *do effectual justice*, and answer the *substantial intent* of the parties; courts of equity will decree the agreement specifically, though, otherwise, the proper remedy would be the recovery of damages: As if the contract be to perform something relating to personal things at several distinct times, or at a future period.

Thus, where A. assigned several shares of * the Ranelagh excise in Ireland to B. and B. covenanted to save A. v. Hays, harmless in respect of that assignment, and to stand in 1 Vern. 189. S. C. 2 Chan. his place touching the payment to the king, and other Ca. 146. matters that were to have been performed by him; 1 Bac. Abr. 69. et vide Buxton v. Lister, 3 Atk. 383. Nanderne v. Wilkes, 1 Eq. Ca. Abr. 393. Pl. 5. that this was no proper subject for equity, nor any thing that the court could decree; for here was no specific covenant, but a general and personal covenant for indemnity, which *founded only in damages*, and could not be ascertained in equity (especially in this case, there being no breach of the covenant assigned in the bill) for, a suit having been brought by the king, was not in itself any breach. But the lord keeper decreed, that B. should perform his covenants, and directed it to be sent to a master; and that, *toties quoties*, any breach should happen, the master should report it specially, that the court, if occasion should be, might direct a trial on a *quantum damnificatus*: His lordship conceiving it conscionable, that B. should be decreed to clear A. from all these suits and incumbrances within a reasonable time.

So,

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[* 219.] * So, where a bill was founded upon articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by instalments, a specific performance was decreed.

Taylor v.
Neville, cited
3 Atk. 384, et
vide Duke of
Buckingham v.
Ward cited
ibid.

Again, suppose that two partners should enter into an agreement by a memorandum to carry on a trade together, and it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they were drawn one of the parties fled off, and a bill were filed: There could be no doubt, but that a court of equity would decree a specific execution, although the contract related to a chattel.

And it is observable, that in all cases of agreements respecting things real, where the bill is filed on behalf of the vendor, in which case the relief prayed is applicable to money only, courts of equity do nevertheless decree a specific execution: The principle upon which such courts govern themselves in this case is, that upon mutual articles there ought to be mutual remedies: but, if the vendee had a remedy both at law and in equity,

[* 220.] * the vendor would not be upon a par with him, unless he also had the same remedies. Besides, the remedy the vendor has at law, is not a remedy adequate to that which he has in equity; for, at law, he can only recover the difference between what he actually sells for, and what he agreed for, in damages; whereas equity will give him the whole sum.

Thus much having been observed, upon the general principles on which courts of equity retain or dismiss bills for the specific execution of agreements, upon matters apparent upon the face of them; the next object of our attention seems to be, what circumstances, connected with, or arising out of the contracts themselves, will be a reason for refusing the aid of the court upon the general merits. And in the pursuit of this enquiry I shall consider,

First, What circumstances furnish a ground, for courts of equity to refuse interfering in cases of agreements. And,

Secondly, What circumstances have been con-

dered

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* considered as not furnishing a ground for courts of equity to refuse the exercise of this power in such cases. [* 221.]

On the first of these heads of enquiry, it is observable, that courts of equity, having necessarily a discretion (not an arbitrary discretion, but a discretion founded upon certain grounds, and governed by fixed rules of equity) in the exercise of their jurisdiction, in making decrees for carrying contracts into execution in specie; because, were it otherwise, they might be obliged to make decrees tending to the ruin of one of the parties to a contract, which would be repugnant to the end of their institution: Therefore, no rule is better established than, *that every agreement, to merit the interposition of a court of equity in its favour, must be fair, just, reasonable, bona fide, certain, in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, consistent with the general policy of a well-regulated society, and free from fraud, circumvention, or surprize; or at least such agreement, must, in its effect, ultimately tend to produce a just end. If any of these ingredients are wanting, or that object be not in view, courts of equity will not decree a specific performance.* [* 222.]

Therefore, if there be any concealment of a circumstance disadvantageous to one party to an agreement, by the other, so as to lead the former into a misconception; *that*, when suggested and proved, will be a solid objection to decree a performance in specie.

Thus, where the defence to a bill, for compelling the execution of an agreement for purchase of an estate, and payment of the purchase money, was, that the estate had been represented to the defendant, as clearly a neat rent of 90*l. per annum*, and no notice had been given him of the necessary repair of a wall to protect the estate from a river, which would occasion an outgoing of 50*l. per annum*; and it appeared upon evidence, that there had been an industrious concealment of this circumstance during the treaty: The court dismissed the bill.

Shirley v. Stratton, 1 Bro. Rep. Chan. 440. et vide Young v. Clerk, pre. Chan. 539. Rochfort v. Creswick, 2. Bro. Par. Ca. 56. Vin. vol. v. 523. Ca. 34. Fran. Max. Eq. 6.

Upon the same principle of unfairness *misrepresentation* is held a good objection to a specific performance.

Buxton v. Lister, et al. 3 Atk. 383.

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[* 223.]
et vide Brei-
ton v. Cowper,
2 Brown's par.
Ca. 535. et
Frank v.
Frank, infra.

Therefore, where an * agreement had been made for the sale of timber trees, and a bill instituted to carry it into execution, it was objected, that there had been *misrepresentation*; for the purchaser had been induced to give 3050*l.* for the trees, by being told by the vendor, that two timber merchants had valued it at 2800*l.* which he said "was true upon his honor, and that when he said upon his honor the vendor ought to believe him;" when, as it came out, the timber merchants, upon whose judgment the vendee bought, did not set any greater valuation than 2500*l.* upon the timber: Lord *Hardwicke* thought this such an ingredient in the contract, as should induce the court not to decree a specific performance.

Per Lord King,
1 Vern. 229,

So, no equity would arise, if the misrepresentation were, as to the identical *person* on whose behalf the contract was entered into. And, therefore, if one, being about to sell an estate, should be informed by A. that the vendor's brother desired to be the purchaser; and, thereupon, the vendor should declare, that his brother should have a better pennyworth than another person, and should article with A. for the sale of it at an under value: If it should turn out that the purchase was in truth * made for a stranger, equity would not decree an agreement so procured to be executed in specie.

[* 224.]

Philips v.
Duke of Buck-
ingham,
1 Vern. 227.

And in the case of *Philips* against the Duke of *Buckingham*, which arose on an agreement between Lord *Nottingham's* secretary and the Duke, who was led by him to conceive that he was treating for Lord *Nottingham*, or for his son; and thereupon declared himself willing to oblige any of that family, and said, that if the chancellor would take any way to satisfy himself of the value, he should set his own price; but it turned out, that in truth, the chancellor's secretary was employed for the plaintiff, who had formerly been in treaty with the Duke, which was broke off on a disagreement in price; and the Duke, afterwards discovering this deception, refused to proceed in the sale, and a bill was filed to compel him to execute the agreement: The lord keeper said, that there not having been fair and open dealing in managing the affair, and the duke appearing to have been misinformed and drawn in, he would not, in equity, carry it into execution for the benefit of a stranger; and dismissed the bill.

But,

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* But in the last case the Lord Keeper declared, that if the bill had been brought in the name of the Lord Chancellor or his son, and he would have patronized the purchase, the articles must have been decreed. [* 225.]

And where, by a fortuitous concurrence of circumstances, a misconception arose, without any actual misrepresentation or deceit, and the sale of an estate by auction was hurt by the act of an agent for the vendor in conjunction with the vendee; the Master of the Rolls considered that as a ground to refuse the interpositions of the court to carry the agreement into execution, although he did not deem it a ground to set it aside.

The material facts of the case above alluded to were these. A. B. and C. (trustees under a will for the sale of estates) put them up by auction. Previous to the sale it was agreed, that the first lot should not be sold under a certain price; but if that was sold, the rest was to go at what they would fetch. The agent for the vendor attended, and was acquainted with this arrangement. He being an attorney, a client of his came up to him, and directed him to bid for him, which he * did, and the first lot was knocked down to him at the price fixed. The others

Twining v. Morrice,
Taggart v. Twining,
Brown's Rep. Chan. 1788.
fol. 326.

were also bought by him. The principal part of the estates turning out afterwards to be freehold, and not copyhold, as supposed, the trustees refused, to complete the contract; and thereupon a bill was filed by the vendee to have a specific performance, and another bill by the trustees to set aside the contract. And Sir *Lloyd Kenyon*, then Master of the Rolls, was of opinion, that although no fraud was imputable to any of the parties, yet, as by an inadvertent act, the agent for the vendor was in a situation that hurt the sale, and was put in that situation by the vendee, it was therefore not such a case as he could decree to be specifically carried into execution, though he would not set the contract aside. He, therefore, dismissed both bills, leaving the parties to their remedies at law. [* 226.]

If a contract be entire, and inequitable in part, equity will not apportion relief. Therefore, where one, upon the loan of 90*l.* had got a bond from the borrower of 1600*l.* conditioned for payment of 800*l.* and judgment thereupon; and the latter was in right of his wife entitled to certain lands, of which

Rich v. Sydenham, 2 Chan. Ca. 202.

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[* 227.] * other persons were seised in trust for her: The court would not, on bill for that purpose, subject those lands to the satisfaction of the obligation; because the security was gotten when the *obligor* was drunk, and therefore the Lord Keeper would not give the obligee any relief in equity, not so much as for the principal he had really lent.

An agreement, unreasonable, exorbitant, and made with a person of weak intellects, although in part executed, will not be specifically decreed.

Edwards v.
Heather, Sel.
Ca. Ch. 3. et
vide 2 Brown's
Par. Ca. 415.
425. Max. Eq.
5, 6.

Thus, where A. sold B. a copyhold estate of the yearly value of 16*l.* on which there was timber to the value of 150*l.* for 630*l.* and covenanted to surrender it on or before the ensuing *Michaelmas*; and B. paid 10*l.* in part of the purchase, entered on the premises, cut down timber, stocked the land, and acted as owner. A. proved he had given notice in writing, that he would surrender next court day, and attended accordingly. On the behalf of B. there were several proofs that he was disordered in his senses, and it was alledged, that as no custom was shewn whereby the tenant was authorized to cut timber, it must * be considered that, according to the common law, he had no such power, and therefore a plain imposition. And the chancellor being of opinion that here was a great over-value, and that the vendee's cutting down timber was a proof of his folly, because a direct forfeiture; and also observing, that it was a matter merely at law, as, if the surrender had been had, an action would have laid, dismissed the bill.

[* 228.]

But exorbitancy of price, uncoupled with circumstances of fraud, has not yet been determined to be a ground, for the court of Chancery to refuse its interposition on behalf of the vendor of an estate.

Keen v.
Stukely, Gilb.
Rep. Eq. 155.

The first case that occurs of this kind is that of *Keen* and *Stukely*, which arose in the court of Exchequer, on a bill filed to compel the specific execution of an agreement for a sale of land at forty years purchase, which was decreed accordingly in the court of Exchequer: But on appeal to the lords, this decree was reversed on another ground, which will presently be stated.

But although exorbitancy of price has not yet been held

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* held a ground to refuse the interposition of a court of equity, to decree the execution of an agreement free from any imputation of fraud practised upon the opposite party; the reason for which seems to be, that laying aside all fraud and institutions of positive law, it is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value; and that, therefore, a man is obliged in conscience to perform a contract which he has entered into, although it be a hard one: Yet a court of equity will not decree a specific execution of a bargain, having this quality imputable to it, unless the party, applying for its assistance, be capable of performing strictly whatever is stipulated to be done on his part. For, in such cases, those courts, considering a bargain as an entire thing, which ought to be performed *in toto* on both sides, or not performed on either; and that the party calling for its aid in a case of hardship has no ground to require it, when he himself cannot perform his bargain, unless he be permitted to discharge it in part by compensation, assume a discretion to refuse interfering. Upon this principle the House of Lords, in the beforementioned case of *Keene and Stukely*, * reversed the judgment of the court of exchequer; because by the agreement, the vendor stipulated that he would, on or before the 29th of *September* then next ensuing, at the proper costs and charges of the vendee, make to him, his heirs, and assigns for ever, a good estate in fee simple, to the satisfaction of the appellant and his counsel; and the title could not be proved to have been made out by that time, by reason of a slip in form; without which being done, the vendor could not entitle himself to the purchase money. [* 229.]

So, where the plaintiff, in a bill for specific performance, agreed to sell his manor and lands to the defendant, by a particular or rental, wherein the manor and royalties were mentioned, but no value set upon them therein; and it happened, that the plaintiff had no title to the manor, but had been in possession of the royalties for several years: It was objected, First, That the contract was at the rate of forty six years purchase, which was an exorbitant price; and Secondly, That though no value was set upon the manor and royalties in the particular, yet they were valuable in themselves; and that, therefore, since the plaintiff could [* 230.]

Hanger v. Eyles, 21 Vin. Abr. 540, Pl. 1. 2 Eq. Ca. Abr. 20, Pl. 16.

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- [* 231.] could not perform his part of the * agreement, by conveying the manor; he ought not to have the aid of a court of equity to compel the defendant to pay the money, since the defendant could not have the full benefit of the agreement: And upon this ground the bill was dismissed, although it was acknowledged that the manor was of little or no value.

Hicks v.
Philips, Pre.
Chan. 575.
et vide 2 Chan.
Ca. 17.
Max. in Eq.
5, 6.

So, where lands, of 180*l.* value yearly, were bargained for at thirty-five years purchase, and the vendor covenanted to convey freehold, and about thirty acres proved to be copyhold; the court of Chancery, this being then deemed an exorbitant price, refused, on a bill for that purpose, to decree a specific performance, even though the vendor offered to procure an enfranchisement of the land, or to make any compensation in the price: For, *per curiam*, this is a case proper for a jury at law to consider of, who may mitigate the damages according to what the circumstances shall appear to be; but a court of equity can take no advantage of such circumstances, but must either decree an execution of the agreement or dismiss the bill. And, therefore, as the plaintiff cannot perform his part of the agreement, because part of the lands being * copyhold cannot be conveyed within the meaning of these articles, the words thereof being all of them proper for conveyances at common law only, the plaintiff ought to be left to make the most of it he can at law, and not aided by a court of equity,

- [* 232.]

Thompson v.
Harcourt,
2 Bro. Par. Ca.
415.

But, if a contract be upon equal terms at the time at which it is entered into, however unequal it become at a future period on subsequent circumstances, a court of equity will nevertheless carry it into execution. Therefore, where, during the execution of the South Sea scheme, A. agreed with B. to pay him 920*l.* *per cent.* for South Sea stock, the court of Chancery, although that stock fell, between the time of entering into the contract and performing it, to par, decreed it to be carried specifically into execution; and that decree was affirmed on appeal to the House of Lords.

Upon the same principle, if A. were bound to transfer stock, on or before such a day to B. and A. suffered the time to elapse, and then the stock rose; A. would still be obliged to transfer so much stock in specie, at the price it bears, and to account for all the dividends

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* dividends from the time at which it ought to have [* 233.] been transferred.

That an agreement is not made *bona fide*, is considered, in equity, as a good objection to its being carried into execution in specie. Therefore, where one, failing in his trade, compounded with his creditors at so much in the pound to be paid at the time therein mentioned; and, he having failed in payment at the precise time, some of the creditors refused to stand to the agreement: The court, on a bill for a specific performance, would not decree an execution specifically, it appearing in the cause, that the trader, to draw in the rest of the creditors, had made an underhand agreement with some of them to pay them their whole debts, though apparently they were to accept of the composition; which was a fraud and deceit on the rest of the creditors.

Again, uncertainty and want of mutuality are decisive objections, in equity, to the specific execution of an agreement.

Thus, where A. settled a manor on trustees, to be by them sold after his death, and * directed the money thereby arising to be disposed of as in the settlement mentioned, &c. with a power of revocation; and afterwards A. on the marriage of B. with one of his daughters, covenanted, that, if B. survived him, and had issue by his daughter, he should have the manor for 1500*l.* less than any other purchaser would give for the same, and A. afterwards revoked the settlement, and disposed of the land to other uses than those therein; The court, on a bill filed for a specific performance of the covenant, refused, upon the hearing, to decree it; first, on the ground of the uncertainty of it, because, if the estate was not to be sold, but B. was to have it, it was not practicable to know what a purchaser would give for it. Secondly, because it was not mutual; for B. was not *bound* to take it at *any* price, and, as the covenant was worded, if B. had died in the life time of A. the covenant would have been of no effect.

But it is sufficient, if there be mutuality at the time the agreement is entered into. And, therefore, in the before mentioned case of *Stapilton and Stapilton*, where an agreement was had between two brothers, the elder of whom

Child v. Danbridge,
2 Vern. 71. et vide Small v. Brackley,
infra.

Bromley v. Jefferies,
[* 234.]
2 Vern. 415.
et vide Gilb. Chan. 242. et Hall v. Butler, Eq. Ca. Abr. 20 7.

Stapilton v. Stapilton,
1 Atk. 10.

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[* 235-] * whom was supposed to have been tenant in tail under an old settlement, but, in fact, was not so, being illegitimate; after the agreement entered into the elder died; it was objected, on a bill filed by his heir for a specific execution, that it was not mutual and equal, for that an alteration as to their mutual benefit had happened by the death of the elder; it being said, that, if the elder had been legitimate, his heir (the plaintiff) would not have been compelled to suffer a recovery, because the issue in tail was not compellable to perform the covenants of his ancestor, tenant in tail. But Lord *Hardwicke* observed, on this objection, that during both their lives, the benefit and objection, was mutual, and the elder would have been equally compellable to suffer a recovery with the younger; and, the chance being at first equal which died first, it would be hard to say, that the act of God should hinder the agreement from being carried into execution.

• Pre. Ch. 544.

• *Benson v. Benson*, 1 P. Will. 130.

Short v. Wood, ibid. 470. et vide *Goylmer v. Paddison*, 2 Vent. 353.

S. C. 2 Vern. 48. Et note, Distinction between money and land so circumstanced.

Note Lord King in *Eyres's case*, 3 P.

Will. 13; and afterwards in *Mr. Onslow's*

[* 236.] case, cited ibid. et 3 P. Will. 8.

refused to make such decree in favor of tenant in tail, with remainder in fee in himself, on the ground that a fine was a thing that took up time; but, notwithstanding this, Lord Parker's rule in *Short and Wood*, consonant to the principal case, has been generally followed, and is now the law. These cases seem to be founded on the ground, that the statute de Donis does not extend to

any thing to be done that must be useless. It is, consequently, a rule of equity, that, ⁿ if money be devised to be laid * out in the purchase of lands to be settled on one and his heirs, the person, for whose benefit the purchase is to be made, may come into court, and pray to have the money itself, and that no purchase may be made: Because no one has an interest in it but himself.

And the same rule prevails in equity, where the applicant is tenant in tail of money, if the remainder in fee be limited to himself.

° Thus, where 2000*l.* were, before marriage, agreed by articles, to be invested in a purchase of lands, to be settled to husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband; the husband received the money, then the wife died, leaving a son and three daughter, and afterwards the husband died intestate: Then the eldest daughter took out administration to her father, and the son instituted a suit against her to have the money paid to him, electing that it should not be laid out in land. It was objected, that this might be a prejudice to the sisters, who, if the lands were to be settled, and afterwards the son should die with-

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out * issue and without levying a fine, would be entitled to them under the contingency; and it was said, there could be no reason to deprive the sisters of that contingency: But the court said, that a fine could not be levied of money agreed to be laid out in land to be settled in tail, but a decree would bind such money equally as a fine would have bound the land, if bought and settled; and, in regard the son would have the entire interest in the land when purchased and settled, and the absolute power over it, and that a court of equity would not decree a vain thing, namely, a purchase and settlement to be made, which the son the next moment by a fine only, which might be levied in vacation time as well as in term, might cut off, it was decreed, that the son should have the 2000*l.* and the administratrix be indemnified.

4 And, if a feme covert is interested in money articted to be laid out in land and settled, she may, by coming into court and consenting, give effect to a disposal of her interest. So, if the party applying for the money were married, and his wife, consequently, entitled to dower; it would, *without doubt*, be expected, * that the wife should appear in court, and give her assent to the husband's receiving it.

But a release by husband and wife (the wife being entitled to an estate in tail in lands purchased with money so circumstanced) to the trustees of the land, will not bind her interest therein.

Therefore where, in consideration of a marriage, 500*l.* was agreed to be laid out in the purchase of lands, to be settled to the use of the husband for life, then to the wife for life, then to the child or children to be begotten by the husband on her body for such estate, and in such proportion, &c. and, in default of issue, to the husband, his heirs, and assigns for ever; they had issue one daughter, who married A. There was no appointment, and the trustee paid the 500*l.* to A. and his wife, who received it as money, and gave a release. A bill was afterwards brought by a daughter by a second marriage against A. as representative of his wife, to have the money as land. And one question was, whether the acts done by A. and his wife were sufficient to vest the money in them *qua* money. *Et per Lord Hardwicke*,
certainly

[* 237.]
them, being entails under agreements, and, consequently, mere creatures of a court of equity, which holds, that the person that is master of such an interest shall, in equity bind it by bargain and sale, or the like without fine; because no injury is thereby done to tenant in tail; as a fine would not require more time, or give him a better chance: But as a recovery takes up time, the court will not

[* 238.]
take that advantage from the remainderman, by suffering his interest, even in an equitable estate, to be barred by a more expeditious process.
43 P. Wilt. 14.
Cunningham v. Moody,
1 Vez. 174.

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- [* 239.] certainly A.'s wife was tenant in tail, reversion in fee, in a moiety to herself, and, therefore, if she had been *sui juris*, and had brought a bill for the money, a moiety would have been decreed to have been paid to her, and the other moiety been decreed to be put out at interest to go as the profits of the land would have done. But here she was a *feme covert*, and then the rule is, that, although she has the reversion in fee of the whole, it shall be laid out as directed, unless some further act be done, by her coming into the court to be solely and separately examined, analogous to the form of a fine at law: And, in such case, if she, without the influence of her husband, declare her consent to have it in money, the court will decree it so; and if she is in the country, and cannot come, there will be an order, in the nature of a *dedimus potestatem*, to examine her there, which will take up time. The payment of the money, therefore, to them in the principal case, she not being *sui juris*, is not equal to a decree of this court, nor is the release sufficient to cause it to be taken otherwise than as land, not being equal to a fine, or sole and separate examination, declaring her free will. Nor can it change the equitable * quality this money has gained, of being considered as land.
- [* 240.]

Vide 1 P. Will.
90. et ibid. 389.

And if tenant in tail, with remainder in fee in himself of money so circumstanced, were an infant, the court probably would not decree the money to be paid to him; because, during his infancy, no fine could be levied, and he might die before he came of age.

Vide Legate v.
Sewell, 1 P.
Will. 807.
Caldwell v.
Shadwell, cited
ibid. 485. et
vide ibid. 471.

Formerly the practice of the court of Chancery was, to make a similar decree upon a bill preferred by tenant in tail, with remainder over to *another* or *others*; and so it stood until the case of *Caldwell* and *Shadwell*, wherein Lord *Cowper* decreed the trust money to be laid out in a purchase of land, and settled on the first tenant in tail, remainder over in tail; to the intent that the remainder-man might have the benefit of the chance intended him by the person creating the trust, in case the tenant in tail should die before suffering a recovery to bar it, which required time, and could not be done in vacation: And the accident of the death of tenant in tail in this case, before a recovery suffered, shewed the remainder-man's interest in so glaring

1 Vez. 176.

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glaring a light, * that it has established the precedent [* 241.] ever since.

But still where there is tenant in tail, remainder in fee in another, the court will decree the money to be paid them, if they agree together upon dividing it.

Thus, where 8000*l.* was devised to be laid out in land, and settled to the use of B. in tail, remainder to C. in fee, B. and C. agreed by articles to divide the money in the manner therein mentioned; and soon after the entering into the articles, and before they were executed by a division of the money, B., the tenant in tail, died without issue: And, on a bill filed for that purpose, a specific performance of these articles was decreed at the Rolls, in favor of the executor of B., and that decree affirmed afterwards on appeal to the chancellor.

But the principle upon which courts of equity proceed in these cases, being the right of the remainderman to the chance of what the time necessarily taken up in suffering a recovery may produce, they do not regard whether the purchase be *bona fide* or not, if the main object be answered; and, therefore, * where money was articulated to be laid out in land, and settled on the first and other sons in tail, the court of Chancery, in order to preserve the chance to the second son, would not decree the money to the eldest son, but ordered the same to be invested in a purchase pursuant to the articles; whereupon the eldest son got one to lend him a purchase, and to settle it, with an intention forthwith to suffer a recovery, and to reconvey the estate back to the seller; yet the purchase, though all this appeared by the master's report, was allowed.

It is a good answer to a bill in equity for an execution in specie, to say, that the agreement upon which it is founded is merely voluntary, and without consideration. The reason is, that a court of equity, *unless in particular instances that furnish exceptions to the general rule* upon its own particular principles, never decrees a specific execution of an agreement, unless it be such an one whereupon *real damages* might be recovered at law. And, although there be, as we have seen, a distinction at law between a bare agreement, and an agreement or covenant under hand and seal, having the solemnities of a deed; inasmuch

as,

Carter v. Carter, Ca. T. Talbot 271.

—v. Marsh, Easter Term 1723. Vide 1 P. Will. 485. in note.

1 Véz. 450. 74. Brownfish v. Gilboine, Strange 738. 1 Atk. 10. Vide supra.

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[* 243.] as, in the latter case, the contract* will support an action at law, though without consideration, the form of the instrument being rather considered there, than the cause of its being made: Yet as, at law, a covenantee, so circumstanced, would recover only mere nominal damages, as a shilling, or the like, courts of equity, that attend to the substantial consideration, and found their jurisdiction on that, and do not notice matters of so slight a value, refuse their interposition in the latter instances, as well as in the former.

Furfaker v. Robinson, 1 Eq. Ca. Abr. 123. S.C. Pre Chan. 475. Gilb. Eq. Rep. 139.

Therefore, where a man covenanted to convey his copyhold to his bastard daughter, and to make further assurance, and she was admitted accordingly, but without a surrender, whereby the copyhold did not legally pass, and then the father died; a bill brought by her against the heir at law of her father to supply the defective conveyance was dismissed: Because the daughter was, in consideration of law, a mere stranger, being *nullius filia*, and then, there being no consideration for the conveyance, it was merely voluntary, in which case a court of equity, it was said, had no foundation to decree against the heir.

[* 244.]
Per L. Keeper, Coventry, 9 Mod. 132. vide 2 Vez. 671. A strong case in favor of children as purchasers under articles.

* Where a settlement or articles are made by the father, or other lineal ancestor, in consideration of the marriage of his son, &c. all the remainders limited to his children and their posterity, are within the consideration of that settlement, or those articles: But where the settlement or articles are made by a brother, or other collateral relation on his intermarriage, then, after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, and not within the consideration of the marriage settlement or articles.

Billingham v. Lowther, 2 P. Will. 249. 1 Ch. Ca. 243.

Thus where L. on his marriage with B. covenanted to settle certain freehold lands to the use of himself and his intended wife for their lives, remainder to the heirs male of his body by her, remainder to his brother in tail, &c. and to settle copyhold estates to the same uses; but died before any settlement was made, and on his road to surrender the copyhold: It was held, on a bill filed by the brother, to have this covenant executed by the heir at law as to the copyhold; that, as to the brother, it was voluntary, he being no party to the articles, nor within the consideration of the marriage

or

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* or marriage portion; and that a voluntary conveyance to a younger brother ought not, if defective in law, to be made good in equity against the heir. And the bill was dismissed. [* 245.]

But, although the rule, that no one can come to a court of equity for a specific performance, who does not come under the consideration of the agreement, still holds good; and, consequently, a specific performance is not now decreed for the benefit of collateral branches in marriage articles: Yet, as agreements are entire, and the several branches of the family may have been in view of the parties at the time of their being entered into, courts of equity have, in latter cases, laid hold of any circumstances that afford a ground to distinguish them from the cases already decided on that head, still adhering to the rule, where such circumstances do not occur.

Upon this principle, if any kind of consideration can be collected from the terms of the contract, the court will lay hold of it to support the claim of remote remainder men.

Thus, where A. seized in fee of lands, had issue
 * two sons, B. and C. and one daughter D. married
 to O. and several other sons and daughters; and, upon
 the marriage of B. he settled part of his estates upon B.
 and his wife, and the issue male of the marriage, with
 a power, if there should be no issue male, and but two
 daughters, to raise 1300*l.* thereupon. B. and his wife
 died without issue male, leaving two daughters; A.
 the father, afterwards settled the estates to several uses,
 with power of revocation, but subject to the charge
 for his grand-daughters. Afterwards A. by indorsement
 revoked these uses, and limited a new use to his
 son C. in fee, but the father continued in possession;
 then A. paid the two daughters of his eldest son 650*l.*
 apiece, making 1300*l.* being their portions under the
 first settlement, and took a receipt from each of them
 in writing. Afterwards, on a treaty of marriage between
 C. with P. in consideration of the intended marriage,
 and 600*l.* portion paid to C. both A. and C. by
 marriage articles, covenanted to convey, within a
 month after the marriage, the said estates to trustees
 and their heirs, to the intent that P. the intended wife,
 should have a rent-charge of 60*l.* *per annum* for life for
 a jointure, and that A. should have a rent charge of
 50*l.*

Osgood v. Strode, et al.
 [* 246.]
 2 P. Will. 245
 S. C. 10 Mod.
 533. Stephens
 v. Trueman,
 1 Vez. 7.

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- [* 247.] 50*l.* *per annum* for life; and that * the estates should, subject thereto, be settled on C. for his life, remainder to his first and other sons in strict settlement, with a provision for daughters, remainder to E. a grandson to A. by another deceased son (since dead without issue) and his heirs male, remainder to his grandson F. son of his eldest daughter, and his heirs male, remainder to the right heirs of A. the father. A. died before any settlement made, the wife of C. died without issue, then C. died without issue, having devised the estates to his heirs at law. And, on a bill filed by F. against the heirs at law, as well of A. as of C. to have a performance of these articles in specie, it was objected that, although the limitations in the articles to C. and P. and their issue, were all on a valuable consideration, having been stipulated for by the friends of the wife, or by the wife, in consideration of the marriage; yet, the subsequent limitations, and, among the rest, that to F. were merely voluntary, and out of the consideration of the marriage or portion, being purely the bounty of him from whom the estate moved; and that it had been often determined, that one and the same settlement might be on good consideration in part, and
- [* 248.] voluntary and fraudulent as to the rest, and so * might articles be. *Sed per Lord Macclesfield*, Chan. the marriage and marriage portion supported only the limitation to the husband and wife and their issue; this was all that was presumed to have been stipulated for by the wife or her friends; but, by the appointment of the estate by A. by the indorsement, to his son C. in fee, which gave C. the legal estate, and also by A.'s having paid to his own grand-daughters their portions of 650*l.* each, and taking their receipt for the money, he obtained an interest in equity in the estate, or, at least, a trust for the raising 1300*l.* upon it; and it could not be intended but that there was some trust between A. and C.; for, that the former would not otherwise have parted with all he had in his life-time to C. and this was rendered still clearer by his continuing in possession after his appointment to his son, and by his son's submitting to accept such limitations as were made him by the articles; wherefore each of them, *viz.* A. and C. having an interest in the premises, so that the one without the other could not make a settlement thereof, here was now a proper person for A. to stipulate with, namely C. his son, that he (A.) would come into those articles

and

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and join therein, on condition that the * estate should, [* 249.] in case of C.'s dying without issue of that marriage, and E.'s dying also without issue male, then go to F. And this probably was part of the marriage agreement, and of the terms on which it was made, though the leaving out the sons of C. by any other marriage, might be a mistake. And, therefore, since this might be, and probably was, nay appeared to have been, the terms of this marriage agreement, and the inducement to A. to join therein, equity ought to decree a performance of it, and the decree, carrying the articles into execution, was afterwards, on rehearing before Lord King, affirmed.

So, where, in consideration of a marriage to be had between F. N. and L. a daughter of S. who was his second wife, O. N. S. N. and F. N. agreed to settle their estates in manner following. The estate of O. N. was to be settled to the use of himself and his intended wife for life, remainder to the first and every other son and sons of the body of the said O. N. on the body of L. his intended wife to be begotten, with several remainders over, remainder to the right heirs of the said O. N. for ever. And S. N. agreed to settle his estate to the use of himself for life, * and after his decease to the use of O. N. and L. his intended wife for life, remainder to the sons of that marriage in tail male, &c. And F. N. agreed to settle his estate to the use of himself and his wife for life, with like remainders to the sons of O. N. in tail. And pursuant to this agreement the estates of O. N. and S. N. were settled to these uses. And F. N. in order to keep his estate in his *name and blood*, and in consideration of the marriage, and of the natural love and affection which he did bear to his cousin O. N. and in consideration of 5s. covenanted for himself and his heirs to stand seised, &c. to the use of himself for life, remainder to his wife for life, remainder to the first and other son and sons of the said O. N. in tail male, remainder to the right heirs, of O. N. for ever. And for the consideration aforesaid, he covenanted for himself and his heirs to surrender his copyhold lands to the same uses, before Michaelmas following. F. N. and his wife died. And a bill was brought by the daughters of O. N. against his heir at law, to have a specific performance of the aforesaid covenant, he having bound himself and his heirs to perform the same. It was objected, that the plaintiffs, being the daughters

Neeve v.

Keck, 9 Mod.

106.

[* 250.]

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[* 251.] ters of O. N. were not likely * to continue the estate of F. N. in his name, nor were they within any of the considerations of the settlement; that, therefore, in respect of them, the covenant stood merely on the foot of a voluntary conveyance, which a court of equity would not carry into execution. But the court was of opinion, that there were several considerations in these settlements, sufficient to raise and support the uses of them: First, it was probable, that O. N. would not have settled his own estate in the manner which he had done, but in prospect of the estate in question, for by that settlement, there was no provision made for younger children; so that if there had been a son of the marriage, the younger children would have had nothing: Secondly, that O. N. who married the daughter of S. was made richer, and that might be a consideration for settling his estate as he did, and the widow of F. enjoyed this copyhold during her life by virtue of this covenant, by which her husband had bound this estate. And the court decreed a surrender pursuant to the covenant.

[* 252] Another circumstance that has been laid hold of by courts of equity, to take cases out * of this rule is, that the agreement is such as that an action may be brought thereupon in the name of the trustees for the recovery of damages; for then, as that remedy may be had at law, the ground upon which a court of equity refuses to execute a voluntary agreement, namely, that nothing can be recovered upon it at law, fails. The court, therefore, being capable of giving a remedy more compleat, and without the circuity of going into a court of law, inforces such an agreement; as being attended with circumstances that make it an exception out of the general rule, and bring it within the ordinary course of proceeding of the court.

* Vernon v.
Vernon, 2 P.
Will. 594.
S. C. 1 Eq. Ca.
Abr. 28. Pl. 33

4 Brown, Par.
Ca. 26.

* The leading case upon this distinction is that of *Vernon against Vernon*, which was a bill for a specific performance of marriage articles, whereby A. covenanted to purchase lands of the value of 350*l.* *per annum*, and settle them on himself for life, remainder to his wife for life, remainder to their first and other sons in tail, remainder to the heirs male of A. by an other wife, remainder to B. brother of A. for life, remainder to his first and other sons, &c. remainder to his second brother in like manner. And the question was,

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* was, whether B. was entitled, by the interposition of the court of Chancery, to have a specific execution of these articles? The objection was, that, as to him, they were merely voluntary; and that, therefore, the utmost the court could do, would be to decree that the brothers should have liberty to bring an action of covenant in the trustees names, against the personal representative of A. in order to recover damages. But Lord King, chancellor, said, that as to what has been observed of putting the plaintiffs to sue the covenant in the names of the trustees in the marriage articles, for the recovery of damages, he did not think it an adequate remedy; the party who would be entitled to the greatest share of the damages would (in case any such were living) be the son of B. as having the first estate tail, but, there being then no such son, he did not see how he could have any part of the damages given in the action of covenant, were it to be brought: Also B. might die without issue, and then his younger brother might be entitled to the first estate of inheritance in the lands to be purchased, who, yet, could not come in for any part of the damages to be recovered on the covenant. But, he said, that if he decreed a specific performance, and a * settlement to be made according to the agreement, then each party entitled, or to be entitled, would have right and justice done them, if not before barred by a legal conveyance, viz. a common recovery. And his lordship decreed the articles to be specifically performed, which decree was afterwards affirmed on appeal to the house of Lords. [* 254.]

And Lord Hardwicke, in the case of *Goring and Nash*, recognized the principle that governed, and approved the decision, in the last case, relying upon it as one ground for the decree he then made; observing, that, in such cases, if the trustees recovered in an action at law out of the real assets of the covenantor, the covenantees might come into a court of equity to have the assets laid out in the purchase of lands: Now, that would be such a circuitry as ought not to be allowed in equity, as it would be more adequate justice to decree immediately. 3 Atk. 186. *et vide Stephens v. Trueman*, 1 Vez. 73. *et Whitmel v. Farrel*, 1 Vez. 256. where this distinction taken, and the court refused to decree a specific execution, because no action would lie by the trustees.

But it is necessary here to observe, that there are circumstances, under which a court of equity will enforce a specific performance of agreements, on which no action can be maintained at law; of this nature are

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[* 255.] conditions * of bonds extinguished and gone, by reason of the obligees becoming executors to the obligor; or by the obligor's marrying the obligee, by which the obligation becomes suspended, and consequently not actionable afterwards, because a personal action once suspended is extinct. Several instances of which we have already stated; but, in these cases, the court does not proceed upon that part of its jurisdiction which authorizes it to carry agreements specifically into execution; for if it did, the objection that there was no consideration, consequently no ground to maintain an action for damages at law, and therefore no foundation for the court of Chancery interposing, on the principle that it can give more effectual relief than the remedy a court of law affords (equity in this as in all cases following the law) would apply. But equity takes cognizance of such causes, upon the ground of its own proper jurisdiction over trusts, fraud, or accident; in which instances its jurisdiction is not enthralled by a respect to legal niceties of the nature alluded to.

[* 256.] Therefore, where A. and B. being brother and sister, and B. the sister having issue two * daughters and one son, A. intending that his sister's son should have his copyhold land, resolved to surrender it to the use of his will, and to devise it to him; but not being able to effectuate this intention, by reason of the officers of the court being out of the way, and so the surrender not practicable, his (A.'s) sister consented to enter into a bond to her son, that she would at any time, upon payment of 200*l.* and upon the request of her son, surrender the estate to him. Then A. the brother died, and afterwards the son died. Then the mother died, having devised this copyhold to one of her daughters. Upon which the other daughter brought her bill, praying a decree for a surrender, and proper conveyance of a moiety of the land, which she would have been entitled to as heir to her brother, had her mother surrendered it to him according to the condition of the bond. One ground of argument offered against this claim, was, that the brother having died intestate, the mother, the obligor, had taken out administration to him, and that there had been no request made by *Anthony* during his life for the surrender; by which circumstances the bond was become extinguished at law, and therefore ought not to be set up in equity.

Park v. Wilson,
10 Mod. 515.
et vide *Channel*
v. Buckle,
2 P. Will. 343.
Alison's case,
9 Mod. 62.

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equity. *Sed per * curiam.* It is plain, from the nature [* 257.] of this transaction, that it was the fixed intention of the uncle, that one way or other, his nephew should have the land. Being disappointed in his intention of surrendering it, in order so to devise it, he had recourse to this bond to secure it to him, which, therefore, on the part of the mother, amounts to an agreement that the son shall have the land. Then the mother must be considered as a trustee for her son; in which case the court will have no regard to the niceties of law, of the bond being extinguished and gone, either by the obligor being administratrix to the obligee, or for want of a request: And a surrender and conveyance was decreed accordingly.

That the principle above mentioned, is the true ground upon which courts of equity proceed in these cases is clear, from the circumstance, that agreements of this nature, which are in fact trusts, although not in writing, will be decreed to be specifically executed, notwithstanding the statute of frauds and perjuries; which we have seen agreements, in the nature of trusts, depending simply upon their own intrinsic circumstances, will not. It was so determined in the case of *Thynn* and * *Thynn*, where T. deceased, having made [* 258.] a will and his wife sole executrix, his son, hearing thereof, came to his mother in the lifetime of his father, and persuaded her, that, there being many debts, the executorship would be troublesome to her, and desired that he might be named executor, for that he, by reason of his privilege in parliament, could struggle better with the creditors; and he procured her to move his father in it, declaring that he would only be an executor in trust for her: She accordingly prevailed with the father that it might be so; and a new will was made, and the son appointed sole executor, and only a legacy of 50*l.* given to the mother. The father died, and the son set up for himself, and denied the trust for the mother. And, on a bill filed by her, it appearing, upon the whole matter, to be as well a fraud as a trust, the lord keeper, notwithstanding the statute of frauds and perjuries, decreed the agreement in favor of the mother.

Those cases, likewise, in which the court of Chancery 2 P. Will. 245. has carried into execution agreements entered into with infants, wherein it is also clear that an action cannot be brought at law for damages, appear to be founded on the

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[* 259.] * exclusive jurisdiction the chancellor possesses, as the guardian of infants, over their acts, by virtue of which, he assumes the power of restraining them from rescinding contracts, and also of carrying into execution contracts entered into by them, where the object is clearly for the benefit of the infant concerned: And permitting such contracts to be infringed, would tend to the injury of infants in general, by discouraging the contracting with them, even upon the fairest and most beneficial terms to themselves.

Methwold v. Walbank,
2 Vez. 238. et
vide 3 Atk.
389.

The power of decreeing agreements being discretionary; if an agreement be to do a thing, which in its tendency would encourage extortion or promote inebriety, a court will not decree it in specie. Therefore, Lord *Hardwicke* dismissed a bill brought, to carry into execution an agreement for the assignment of the fees and profits of the office of keeper of Bridewell, and of the profits of the tap-house: Observing, that he never would suffer the keeper of a house of correction to assign over the profits and fees of his office; for it must plainly lead to oppression and extortion, and ought not to receive countenance. And, as to the latter part of the agreement, his * lordship said, that it tended to increase riot and debauchery amongst the prisoners.

Hayes v. Cary,
1 Brown's
cases, Par. 27.
5 Vin. Abr.
538. Pl. 18.
Ground of law
and equity,
18. c. 6.

And, where one party has trifled, or shewn a backwardness in performing his part of the agreement; equity will consider this as a good objection to a specific execution being decreed in his favor, especially if circumstances are altered in the mean time.

* Wingfield v. Whaley, 5 Vin. Abr. 534. Pl. 38.

^k Where a contract has lain dormant for many years, there shall be no specific performance.

^l Vide Treat. of Equity 37.

^l But special circumstances may alter the case: As if there be articles on marriage to purchase lands, and to settle them within three years; these shall not be waved by length of time, if the covenantor happen to have been in trade, and could not spare the money.

Having gone thus far in explaining the principles, upon which a court of equity refuses its interposition, I shall now, Secondly, endeavour to point out principles, by which we may judge when a court of equity will not refuse its aid in decreeing a specific execution

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* cution of agreements; or what cases furnish exceptions to the before-mentioned rules of equity. [* 261.]

It is no objection to the specific performance of an agreement, that it operates in nature of a wager; and, in that light, is rather the subject for damages: Therefore, where A. having a lease from the dean and chapter of ——— sold it to B. and it was agreed, that upon A.'s abating part of the money, B. should, upon the restoration of the king, and of the dean and chapter, reconvey it to A. a specific performance of the agreement was decreed, notwithstanding it was objected, that being in nature of a wager, it was a subject more adapted to the jurisdiction of a court of law.

Though an agreement be founded in misrepresentation, as on a false suggestion: As if one party agree upon an opinion (raised by false impressions, that he has not, when, in truth he has a title) to permit another to enjoy lands; this will be no objection to its being decreed, if there is a ground of inquiry more favorable in support of it, than this furnishes * in derogation of it: As if it were alleged, that the intention of a testator. [* 262.]

Thus, where one (seised in tail of freehold lands, with remainder to his elder brother, and of copyhold lands in fee) devised his freehold lands to his younger brother, and the copyhold lands to his elder brother, and died; and the devisees agreed, by writing under their hands, that the lands should be enjoyed by each of them accordingly; which agreement the elder was induced to enter into by the younger *pretending that the deviser had suffered a recovery*, and produced an exemplification thereof: The agreement, *although, on investigation, it turned out that no complete recovery had been suffered*, was decreed to be specifically carried into execution, being consonant to the testator's intention; and a bill of review was dismissed with costs.

And a court of equity would decree an agreement, notwithstanding the plea of its having been entered into under a mistake, if the effect of it were to dispense with a forfeiture; because courts of equity always favour any contract, which restrains its meddling in cases of that kind.

But,

Parker v. Palmer,
1 Chan. Ca.
42. S. C. 1 Eq.
Ca. Abr. 17, 2.

Frank v. Frank, 1 Ch. Ca. 84. et vide Cann v. Cann, 1 P. Will. 723.

Vide Pullen Ready 2 Atk. 587.

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Broderick v.

[* 263.]

Broderick,

1 P. Will. 239.

et 1 Vern. 20.

vide infra.

* But, unless in cases, circumstanced as those last mentioned, wherein the effect of the agreement is equitable as between the parties *in the particular predicament* in which they stand, ignorance in a party of his right, or its being concealed from him by the person with whom he stipulates, will, it seems, be a sufficient inducement for denying such person, at least, the assistance of a court of equity; for *suppressio veri*, or *suggestio falsi*, each of them furnish not only a solid objection in equity to give effect to, but sufficient grounds for setting aside, any instrument.

Per Lord

Hardwicke,

2 Atk. 592.

But in cases, where, if there be any mistake, it is the mistake of all the parties to the agreement, and no one is more under an imposition than another; courts of equity hold, that to shake them on that account would be mischievous, tending to make all agreements vain and nugatory. And in such case the mistake is not the occasion of the promise, therefore the act is valid, there being nothing wanting of the true assent on all sides.

Vide Pullen v.

[* 264.]

Ready 2 Atk.

591.

And if parties are entering into an agreement, and the instrument containing information * respecting *that*, in which the mistake is said to be, is lying before them and their counsel, while the draughts of the agreement are preparing; the parties will, in equity, be supposed to be acquainted with the consequences of law as to those points, and none of them will ever be relieved under pretence of mistake or surprise, when such circumstances attend the case; for it is each of their business to search out the truth.

1 Atk. 11.

Cory v. Cory,

1 Vez. 19.

A court of equity will carry an agreement between a father and his children, made with a view to a just and proper family arrangement into execution, although it be objected, that the father has made use of his coercive power over one of his sons to force him into it; for although equity does not favour agreements made by compulsion, yet it always considers the reasonableness of the agreement. As if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted; though there may have been something of that sort, yet, if the agreement be reasonable, a court of equity will not set it aside: And upon this ground

Lord

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Lord *Hardwicke*. * thought that, where an agreement [* 265.] was made to settle disputes in a family, and reasonable in itself, it was no solid objection, that one of the parties was drunk at the time of entering into it.

A court of equity will decree a specific performance, notwithstanding it be objected, that the party stipulating had no interest in the thing stipulated for at the time of the contract made; and the subject be of a nature that no contract, strictly legal, will attach upon for want of possession, on a distinction founded on the different modes in which courts of law and of equity enforce their decisions.

Thus where A. by articles between him and B. Wiseman v. Roper, 1 Ch. Rep. 84, 85. Et vide Hobson v. Trevor, 2 P. Will. 191. et Longford v. Pitt, infra. the plaintiff's father, reciting a marriage lately had between the plaintiff, nephew of A. and C. his wife, without the privity, consent, or good liking of B. did, for the considerations therein mentioned (amongst other things) covenant with B. to convey within one month after the death of D. who was A.'s brother, unto the plaintiff and his wife, or the survivor of them, and the heirs of the plaintiff, the manor of H. with the appurtenances, reserving an estate to himself for his life, and * gave a statute of 5000*l.* for performance; [* 266.] and D. died, and the manor of H. descended to A., but charged with great debts; the plaintiff's bill was to compel B. to perform the articles: And one objection was, that this was a covenant of one, not in possession, nor having any estate in the manor at that time, to settle; and respecting lands over which, at the time of the covenant entered into, the party contracting had no power whereby he might charge the same, but a bare possibility, in case D. did not alien them. But the court, after great deliberation, and searching for precedents, was of opinion, that the agreement ought to be decreed in specie, the decree not binding the interest in the lands, but affecting the conscience of the party.

And it will make no difference in respect to performance in specie, although it be evident, from the person's own shewing who institutes the suit, that he had not, at the time of entering into the agreement, respecting which the suit is preferred, a good title to the hereditaments which are the subject of it.

Therefore, where articles were entered into Longford v. Pitt, 2 P. Will. 629. in November 1725, for sale of, and to convey an

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[* 267.] * an estate, upon which conveyance the vendee was to pay 1500*l.* to the vendor; and, on a bill preferred by the vendor against the representatives of the vendee to be paid the 1500*l.* the vendor's own witness proved, that, in 1728, the vendor had paid money to his eldest brother's daughter, being the heir general of the family, for her joining with her husband in a deed and fine to the use of the vendor and his heirs; it was urged as a reason for refusing to decree the money, that it was evident, by the vendee's own shewing, that, at the time of entering into the articles, he had not a good title to the premises: But the master of the Rolls said, that it was sufficient, if the party entering into the articles to sell, had a good title at the time of the decree; the direction of the court in all these cases being to enquire, whether the seller can *then*, not whether he could at the time of executing the agreement, make a good title.

Lord Stourton
v. Sir T. Meer.
2 P. Will. 630.

And the court of Chancery, in the case of Lord *Stourton* against Sir *Thomas Meer*, more than once indulged the former (who, at the time of the articles for a sale of land, and even when the decree was pronounced, could not make a title, the reversion in fee being in * the crown) with time for getting in this estate, which could not be effected without an act of parliament for that purpose.

[* 268.]

Vide *Sidney v. Sidney*, 3 P. Will. 276.
2 Eq. Ca. Abr. 29. Pl. 37.

A charge of adultery or elopement, positively made, is not a ground for a court of equity to refuse a decree for a specific performance of marriage articles: Because, the import of them being generally, that the husband shall settle such and such lands on his wife for her jointure, they take effect as giving an interest in the nature of a vested jointure; inasmuch as what is covenanted to be done for a good consideration, is considered in equity as done: Consequently the wife's right under them being, in effect, a jointure, is not forfeitable either for adultery or elopement.

A court of equity will decree an agreement, although it be objected, that it refers to foreign customs; *provided* the distinct *quantum* of interest each person is to have in that which is the subject of the contract, be capable of being ascertained.

Feneburt v. Turst, Pre. Chan. 207.
3 Bro. Par. Ca. 19.

Therefore where, on a marriage in *France* it was stipulated, that the husband surviving the wife, should have

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* have three hundred livres by way of a present, and also two-thirds of her fortune for life (whereas by the custom of *Paris*, where they married, he would have had but a moiety) and that the rest should go according to the custom of *Paris*: It was determined, on appeal to the house of Lords, from a decree of the lord keeper, that this contract should be carried into execution *in toto*, and not restricted only to the sum stipulated: For the saying the rest should go according to the custom of *Paris*, was, in effect, the same as if the circumstances of that custom had been recited at large in the instrument. [* 269.]

Lord *Hardwicke*, in the case of *Hinton* against *Hinton*, where an agreement was entered into between a father and a son while the father was in goal, thought that circumstance an objection to the court decreeing a specific performance; unless all the facts attending it were precisely stated, and the agreement cleared from the suspicions of impropriety, which that accident threw upon it *prima facie*: But his lordship had no doubt but that a man might make an agreement in goal, provided he had proper assistance and advice, and that it were * done in a fair manner, and for a full consideration. And all those circumstances being made out to his satisfaction in this case, his lordship decreed the agreement, though made under that predicament, to be carried into effect. [* 270.]

Where the *public interest* is concerned, the court of Chancery will decree a specific performance of an agreement, although there be persons concerned in the subject contracted about, who are not parties to the suit.

Thus, where the bill was to have a decree for an inclosure, upon the foundation of an agreement entered into: It appearing by the bill that there were, by the agreement, to have been eighteen allotments, and that there were but fifteen parties to the suit, it was objected, that all the parties to the agreement were not parties to the suit. But the court decreed the agreement to be performed, saying, that it should not be in the power of one or two wilful persons to oppose a public good.

So, if an agreement be made between a lord and his tenants touching the stint of common, and one or two

Hinton v. Hinton, 1 Vez. 631.

Thirveton v. Collier, 3 Ch. Rep. 8. Et vide *Lady Widrington's case*, cited 2 Vern. 225. Sed vide 2 Vern. 103. where this was denied to be the rule on a bill for an inclosure.

Delabeer v. Beddingfield, 2 Vern. 103.

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[* 271.] two capricious tenants will not come in; a specific execution will nevertheless, be decreed, founded on its being proper on principles of natural equity.

One of the parties to a contract being by himself incapable of performing it, furnishes no ground for dispensing with a specific execution.

Barrington v.
Horn, 2 Eq. Ca.
Abr. 17. 7.
5 Vin. Abr.
547. 15.

Thus where, on a bill to compel the defendant and his wife to join in a fine to the plaintiff, pursuant to the covenant of the former in a conveyance, the defendant, his wife, and son, set forth in their answer, that the husband was tenant for life, remainder to his wife for life, remainder to the heirs of the husband begotten upon the wife, remainder to the husband's heirs; and insisted, that nothing passed by the conveyance, but an estate for life of the husband, and that the wife did not seal the deed: Lord Cowper, Chancellor, decreed *notwithstanding*, that the husband should procure his wife to join with him in a fine according to his covenant; since he had taken upon himself so to do, *and the plaintiff had paid the full value of the estate.*

[* 272.]
Cleaton v.
Gower, et al,
Finch 164.

* So, where A. tenant for life, agreed with B. that B. paying a certain rent, should open mines in his settled estate, and set on foot works at his own charge, and should enjoy the same for ten years, if A. or any of his issue male should so long live, and B. entered accordingly, and expended money in building works, and paid the rent until he was interrupted: On a bill filed by him to have an execution of the agreement in specie, A. by his answer, alledged, that he was only tenant for life, and subject to be called to account for waste, and could not execute this agreement, because it was inconsistent with his power so to do. But the court, nevertheless, decreed, that A. should execute his agreement in specie, as far as he was capable of doing it. And directed him to seal a lease for ten years.

Gibson v. Pat-
terson, 1 Atk.
12. 1 Vez. 450.
1 Bro. Ca. Par.
460.

Again, That the time limited for performance of an agreement is lapsed, is no solid objection to a decree for performance of it: For it is the business of a court of equity to relieve against lapse of time in the performance of agreements; especially if the non-performance does not arise by default of the party

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* party seeking to have a specific performance. There- [* 273.]
fore a bill brought for a specific performance, was decreed in favor of the plaintiff, without any regard had to the lapse of time, by reason of the plaintiff's negligence in not producing his title deeds, and not tendering a conveyance within the time limited for that purpose by the articles: The lord chancellor observing, that most of the cases which were brought in that court, relating to the execution of articles for sale of estates, were liable to this objection, but that he thought there was nothing in it.

The change of the condition of a person entering into an agreement: As if he become lunatic; will not affect the right of the parties, but that will be the same as before, provided they can come at the remedy. This is consonant to a common maxim of the civil law, *that madness coming upon a man, destroys not any business which he had before duly performed.* Thus, if the legal estate is vested in the trustees of a lunatic, a court of equity ought to decree a performance, and the act of God will not change the right of the parties. But if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and reduce the * parties to the necessity of proceeding at law, where the lunacy of the party will be an impediment, by suspending the contract till he recovers the government of himself and of his actions. [* 274.]

It is no objection to a decree for an execution in specie to say, that the agreement was *voluntary*, if it be an agreement to do that, which the court would have required to be done on application to them: As if a man, having run away with a girl possessing a good fortune in trustees hands, after marriage agree to lay it out in lands to be settled in strict settlement; this will be binding; nor will a court of equity relieve a man's creditors against this agreement: Because, had the husband himself applied to the court for the money, the court would not have decreed it to him without such a settlement. Moor v. Ry-
cault, Prec. Ch.
22.

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- - - - - an agreement with a second wife, notwithstanding there be a first wife living, 2 vol. *ibid*.

will not decree alimony, but will decree an agreement for a separate maintenance in nature of it, 2 vol. 11.

will decree an agreement respecting copyholds, 2 vol. 12, 13.

- - - - - in some cases, where there is no remedy at law, 2 vol. 14, 15.

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Farther observations on this head of Equity, 2 vol. 17—19.

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Exception to this exception as to marriage agreements, 2 vol. 28—31.

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consider a vendor under an executory agreement, as a trustee for the vendee; and all persons having claims upon him (the vendor) as subject to the consequences that follow from that inference, 2 vol. 57, 8.

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- - - -, if new matter come out respecting an agreement, against which a decree has been made, support the agreement on an application by other parties not bound by the former decree, 2 vol. 138—140.

, if a question of fact arises on a bill for specific execution of an agreement, direct an issue at law to ascertain it, 2 vol. 140, 1.

will, on an agreement for a purchase of land, take care that there are usual covenants in the conveyances, if so stipulated, 2 vol. 141, 2.

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- - - - relieve against unreasonable contracts or agreements, 2 vol. 143.

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Vide UNREASONABLENESS, FRAUDULENT, CONTRACT.

will, on relieving against an inequitable advantage taken in a bargain by one party, decree such party to refund what he has received more than is due, 2 vol. 151.

will not set aside a bargain on the ground of inadequacy of price.

Vide INADEQUACY of Price.

will relieve against a contract entered into under the impulse of fear.

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require the party filing a bill for performance of a contract, for non-performance of which a penalty is recoverable at law, to waive it, 2 vol. 204.

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And if the agreement be denied in the answer, and proved by one witness only, the court will make an order to try it at law, and retain the case upon the equity reserved, *ibid.*

Exception also to this rule, where the matter of fraud is mixed with the damages, 2 vol. 216, 217.

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will not make a decree, that will be vain and nugatory; or direct that which will be useless, 2 vol. 235.

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- - - the specific performance of marriage articles, notwithstanding a charge of adultery or elopement positively made, 2 vol. 266, 7.

- - - - - of an agreement, although it refer to foreign customs or usages, 2 vol. 267, 8.

- - - - - though one party be in goal, if it be done in a fair manner, 2 vol. 268.

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Quære, if it would be so where the money was expressly agreed to be paid *on the conveyance* being made, *ibid.* 68, 69.

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